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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 473

JOHN D. PENNEKAMP AND THE MIAMI HERALD PUBLISHING COMPANY, PETITIONERS,

vs.

THE STATE OF FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR CERTIORARI FILED OCTOBER 1, 1945.

CERTIORARI GRANTED NOVEMBER 5, 1945.

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IN THE CIRCUIT COURT IN AND FOR THE COUNTY OF DADE, FLORIDA

CITATION FOR CONTEMPT—Filed November 10, 1944

Whereas, on November 2, 1944, the Circuit Court in and for Dade County, Florida, was not in vacation but was in session or in term time; and

Whereas, you, John D. Pennekamp, were on said date Associate Editor of the Miami Herald, a newspaper published in Miami, Dade County, Florida, within the territorial jurisdiction of the said Circuit Court; and

Whereas, there were pending in said Court on said date divers cases both at law and in equity involving many questions of law; and

Whereas, the Honorable George E. Holt, one of said Circuit Judges, was then temporarily absent; and

Whereas, the Miami Herald is a newspaper of large circulation and you, the said John D. Pennekamp as associate editor thereof did cause to be published in said Miami Herald a certain editorial together with a cartoon purporting to illustrate the said editorial according to its tenor and effect, which said editorial and cartoon are hereto attached and made a part hereof; and said editorial after very properly observing that the people's courts have been established to promote justice and that proper places have been provided for the court and further truthfully stating that:

> "Upon the judges the people must depend for the decision and the judicial conduct that will insure society—as a whole and in its individuals—against [fol. 4] those who would undermine or destroy the peace, the morality and the orderly living of the community."

and that:

> "• • • in order that the courts should not be amenable to political or other pressures in their determination of matters placed before them, Florida Circuit Judges are called upon to face the electorate less often than are other elective office holders."

and that the judges:

> "• • • are the first line of defense locally of organized society against vice, corruption and crime, and the sinister machinations of the underworld."

and thereupon in opposition and antithesis to the proper functions of this Court in the discharge of its duty as you so well recognize, said editorial did adversatively further state:

> "Every accused person has a right to his day in court. But when judicial instance and interpretative procedure recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embar-ass and nullify prosecution, then the people's rights are jeopardized and the basic reason for courts stultified.
>
> [fol. 5] The seeming ease and pat facility with which the criminally-charged have been given technical safeguard have set people to wondering whether their courts are being subverted into refuges for lawbreakers."

whereby you did reflect upon and impugn the integrity of said Court and the Judges thereof in imputing that the Judges of said Court "do recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to block, 'hwart, hinder, embarrass and nullify prosecution," which said acts by you tend to create a distrust for said court and the judges thereof in the minds of the people of this county and state and tend to prevent and prejudice a fair and impartial action of the said Court and the Judges thereof in respect to the said pending case.

(A)

Rape Cases

Whereas on October 30, 1944, at the time set for the arraignment of eight defendants charged with rape in those cases numbered 847, 850, 855 and 856 then pending in said Court, a motion to quash was filed by defense counsel in case No. 856 and the legal representative of the office of the State Attorney (Asst. State Attorney Henry Jones then present in

court with Asst. State Attorney H. Frost Bailey—the State Attorney being then absent) then and there agreed in open court that said indictment No. 856 as well as the others were so defective as to make it advisable that the State not go to [fol. 6] trial upon said indictment and thereafter the Judge of said Court then sitting (Paul D. Barns) did sustain said motion in respect to case No. 856; and

Whereas, on October 31, 1944, after new indictments were returned against the same defendants and their cases promptly set for trial on specified days;

You, by said editorial and cartoon of November 2, 1944, have willfully or wantonly withheld the full truth from the public and have likewise failed to fairly report the action of the Court and Judge thereof in respect to said indictments by stating only that "Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn" withholding the truth by failing to state the act of the representative of the State Attorney's office, and in connection therewith published said cartoon entitled, "But, Judge!" making more definite the false imputation implied by the editorial and not expressed in words to the effect that fair and impartial justice was not being done between the State of Florida (represented in said cartoon by the little character as "Public Interest" being neither heard, recognized nor favored) and the defendants (represented in said cartoon by the large character beside the judge and on the bench and being heard, recognized and favored).

(B)

Brook Club Case

Whereas there was and is now pending in the said Circuit Court since March 22, 1944, a chancery suit entitled, "State of Florida v. The Brook Club, Inc., et al., No. 84054, wherein [fol. 7] the answer to the bill of complaint was filed in due course on May 1, 1944 and

Whereas the Honorable Stanley Milledge, State Attorney, had allowed the time for taking testimony to expire (more than 90 days) without taking any action on or testimony on said bill of complaint after same came at issue; and

Whereas, after ample notice given to the State Attorney and acknowledged by him in writing, all as shown by the record of said cause, the case was set down for hearing for final decree in accordance with law; and

Whereas final decree of dismissal was entered in said cause on October 31, 1944, by Marshall C. Wiseheart, another Circuit Judge whose duty it was by reason of the absence of the said George E. Holt and in the exercise of sound discretion, to entertain said motion and to rule thereon according to the law of the State of Florida; and

Whereas, concerning said act by Judge Wiseheart, said editorial instead of fairly stating that said cause came on for hearing *after notice* (7 days) to the Honorable State Attorney, said editorial reads that "• • • the case appeared out of blue sky • • •" before Judge Wiseheart and said editorial comments that:

> "The judge dismissed the injunction against the club and its operators. The defense got delay when it wanted and prompt decision from the court when it profited it."

and in connection therewith published said cartoon entitled, "But, Judge!" making more definite the false imputations [fol. 8] implied by the editorial and not expressed in words to the effect that fair and impartial justice was not being done between the State of Florida (represented in said cartoon by the little character as "Public Interest" being neither heard, recognized nor favored) and the defendants (represented in said cartoon by the large character beside the judge and on the bench and being heard, recognized and favored).

Whereas you did thereafter on November 7, 1944, likewise cause to be published an editorial in said Miami Herald entitled "Why People Wonder" reading as follows:

> "Here is an example of why people wonder about the law's delay and obstructing technicalities operating to the disadvantage of the state—which is the people—in prosecutions. After stalling along for months, the defense in the padlock case against the Brook Club appeared before Judge Marshall C. Wiseheart for a decision. The State Attorney was working with the grand jury. The court knocked out the injunction. There was speed, dispatch, immediate attention and action for those charged with violation of the law. So fast that the people didn't get in a peep.
>
> That's one way of gumming up prosecution. Another is to delay action • • •"

with the effect of emphasizing the misleading and deceptive representations aforesaid, copy of which editorial is hereto attached and made a part hereof.

[fol. 9] (C)

Teepee Club Case

Whereas, at the time of said publication there was then and is now another pending suit brought in the name of the State of Florida by the Honorable Stanley Milledge, State Attorney, to abate a nuisance at a certain place known as the Teepee Club in said Dade County, said case being entitled, State of Florida v. Joseph W. Lipop, et al., No. 87365, and said editorial after reciting that same was an injunction suit to abate a nuisance (bookmaking) did mention the Judge's ruling in respect thereto and thereupon did specifically comment concerning it that:

> "This may be good law, exact judicial evaluation of the statutes. It is, however, the character of legal interpretation which causes people to raise questioning eyebrows and shake confused heads in futile wonderment."

and in connection therewith published said cartoon entitled "But, Judge!" making more definite the false imputations implied by the editorial and not expressed in words to the effect that fair and impartial justice was not being done between the State of Florida (represented in said cartoon by the little character as "Public Interest" being neither heard, recognized nor favored) and the defendants (represented in said cartoon by the large character beside the judge and on the bench and being heard, recognized and favored); and

Whereas, you, by said cartoon and editorial, have caused to be represented unto the public that concerning the cases of (A) the eight indictments for rape, (B) the said Brook Club case, and (C) the Teepee Club case, that the Judges of this Court fairly and impartially heard and decided the matters in said editorial mentioned and have thereby represented unto the general public that notwithstanding the great public trust vested in the Judges of this Court that [fol. 10] they have not discharged their duties honorably and fairly in respect to said pending cases as hereinbefore set forth, all of which tends to obstruct and interfere with

the said Judges as such in fairly and impartially administering justice and in the discharging of their duties in conformity with the true principles which you have so properly recognized in the forepart of said editorial above quoted as being incumbent upon them and each of them; and

Whereas, the said Miami Herald and the aforesaid publications were the acts and deeds of The Miami Herald Publishing Co., a corporation, and with like consequences and effect;

This is therefore to command you, and each of you, the said John D. Pennekamp and The Miami Herald Publishing Co., to be and appear before the Circuit Court of the 11th Judicial Circuit of Florida, in the south Circuit Court room in the court house of Dade County, Florida, at ten o'clock A. M., November 28, 1944, and then and there show cause if any you have why you should not be held and adjudged to be in contempt.

Done and Ordered this November 10, 1944.

Marshall C. Wiseheart, Paul D. Barns, Circuit Judges.

[fol. 11] EXHIBIT TO CITATION FOR CONTEMPT

Courts Are Established—

For the People

The courts belong to the people. The people have established them to promote justice, insure obedience to the law and to Punish Those Who Willfully Violate It.

The people maintain the courts by providing the salaries of officials and setting up costly chambers and courtrooms for the orderly and dignified procedure of the tribunals.

Upon the judges the people must depend for the decisions and the judicial conduct that will insure society—as a whole and in its individuals—against those who would undermine or destroy the peace, the morality and the orderly living of the community.

In Order that the courts should not be amenable to political or other pressures in their determination of matters placed before them, Florida Circuit judges are called upon to face the electorate less often than are other elective office holders.

So long are their terms, in fact, that in Dade county no Circuit judge, and only one judge of another court, has come to the bench by public choice in the first instance. All the others have been named by a governor to fill a vacancy caused by death or resignation, or similar circumstance.

Judicial terms in Dade county run:

1—Six years each for six Circuit judges.

2—Four years each for two Civil Court of Record judges.

3—Four years for the judge of the Criminal Court of Record.

4—Four years for the judge of the Court of Crimes.

5—Four years for County judge.

6—Four years for Juvenile court judge.

These twelve judges represent the majesty and the sanctity of the law. They are the first line of defense locally of organized society against vice, corruption and crime, and the sinister machinations of the underworld.

It Is beyond question that American courts are of, by and for the people.

Every accused person has a right to his day in court. But when judicial instance and interpretative procedure recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify prosecution, then the people's rights are jeopardized and the basic reason for courts stultified.

The seeming ease and pat facility with which the criminally charged have been given technical safeguard have set people to wondering whether their courts are being subverted into refuges for lawbreakers.

This Week the people, through their grand jury, brought into court eight indictments for rape. Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn. Back they went to the grand jury for representation to the court.

Only in the gravest emergency does a judge take over a case from another court of equal jurisdiction. A padlock action against the Brook Club was initiated last spring be-

fore Judge George E. Holt, who granted a temporary injunction.

After five months, the case appeared Tuesday out of blue sky before Judge Marshall C. Wiseheart at the time State Attorney Stanley Milledge was engaged with the grand jury.

Speedy decision was asked by defense counsel despite months of stalling. The State Attorney had to choose between the grand jury and Judge Wiseheart's court.

The judge dismissed the injunction against the club and its operators. The defense got delay when it wanted and prompt decision from the court when it profited it.

On Oct. 10 Judge Holt had before him a suit by the state to abate a nuisance (bookmaking) at the Tepee Club.

Five affidavits of persons who allegedly visited the premises for the purpose of placing bets were introduced by the state over the objection of the defendants.

Judge Holt ruled them out, explaining in denying the injunction against the Tepee Club:

"The defendant cannot cross-examine an affidavit. The court cannot determine who is testifying and whether belief can be placed upon such testimony • • • The fact that such affidavits were taken before the State Attorney does not give them any additional weight or value."

This may be good law, exact judicial evaluation of the statutes. It is, however, the character of legal interpretation which causes people to raise questioning eyebrows and shake confused heads in futile wonderment.

If Technicalities are to be the order and the way for the criminally charged either to avoid justice altogether or so to delay prosecution as to cripple it, then it behooves our courts and the legal profession to cut away the deadwood and the entanglements.

Make it possible for the state's case, the people's case, to be seen with equal clarity of judicial vision as that accorded accused lawbreakers. Otherwise technicalities and the courts make the law, no matter what the will of the people and of their legislators.

(Here follows 1 photo, folio 11a)

But, Judge!

11a

[fol. 12] EXHIBIT TO CITATION FOR CONTEMPT

Why People Wonder

Here is an example of why people wonder about the law's delays and obstructing technicalities operating to the disadvantage of the state—which is the people—in prosecutions.

After stalling along for months, the defense in the padlock case against the Brook Club appeared before Judge Marshall C. Wiseheart for a decision. The State Attorney was working with the grand jury. The court knocked out the injunction. There was speed, dispatch, immediate attention and action for those charged with violation of the law. So fast that the people didn't get in a peep.

That's one way of gumming up prosecution. Another is to delay action. On March 29, Coy L. Jaggears, bus driver, was sentenced to fifteen days in city jail by Judge Cecil C. Curry on conviction of beating up a taxicab operator.

The arrest precipitated the notorious bus strike. As a result, Jaggears walked out of jail after posting a $200 appeal bond. The appeal never got further.

There you have the legal paradox, working two ways, but to the same purpose against prosecution. Speed when needed. Month after month of delay when that serves the better.

[fol. 13] IN THE CIRCUIT COURT IN AND FOR THE COUNTY OF DADE

RETURN OF RESPONDENTS, JOHN D. PENNEKAMP AND THE MIAMI HERALD PUBLISHING CO.—Filed November 28, 1944

Come now the respondents, John D. Pennekamp and The Miami Herald Publishing Company by their undersigned attorneys in response to the citation for contempt bearing date of November 10, 1944, and move to quash said citation on the following grounds:

1. The Court was without jurisdiction to issue said citation.

2. The said citation was not verified by any person and was not issued in form and manner required.

3. The publications mentioned in said citation were not contemptuous.

4. The publications upon which said citation was based constitute legitimate criticism and comment within the guaranties of Section 13 of the Declaration of Rights of the Constitution of Florida.

5. The publications upon which said citation was based constitute legitimate criticism and comment within the guaranties of the First and the Fourteenth Amendments to the Constitution of the United States.

6. The publications complained of created no clear and present danger to the administration of justice.

Further answering said citation the respondents, John D. Pennekamp and The Miami Herald Publishing Company, [fol. 14] show as follows:

1. That John D. Pennekamp is and was on November 2, 1944, the Associate Editor of the respondent, the Maimi Herald Publishing Company, which company publishes in Miami, Dade County, Florida a daily newspaper known as The Miami Herald; that said John D. Pennekamp, as Associate Editor thereof, did cause to be published the editorials complained of that appeared in The Miami Herald on November 2, 1944 and November 7, 1944, and the cartoon complained of that appeared in The Miami Herald on November 2, 1944. Respondents deny that the publication of said editorials and said cartoon created a clear and present danger to the orderly and fair administration of justice in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Date County. On the contrary, these respondents affirmatively state that said editorials and said cartoon were intended to be and in fact were published in the interest of orderly and fair administration of justice in Dade County as if more fully set forth in the affidavit of John D. Penekamp, marked Exhibit "A", attached hereto and asked to be read as a part hereof and also in the affidavit of Jeanne Bellamy Bills marked Exhibit "B", attached hereto and asked to be read as a part hereof.

2. Specifically answering the allegations of the paragraph entitled (A) "Rape Cases", these respondents deny the particular facts set forth in the first paragraph referring

to the Rape Cases. Respondents are informed and believe that the indictment in Case No. 856 was typical, that the original indictment omitting formal parts is as quoted below, omitting the words underscored and that the amended indictment is exactly as set out below:

> [fol. 15] That heretofore, to-wit, on the twenty-ninth day of August, A. D. 1944, within the County of Dade and State of Florida, NEWTON REID BLACK, THEODORE ROBERT DIENGER and JOHN REMER MUIR unlawfully and feloniously an assault did make in and upon the body of one DOROTHY MAY WHEELER, a female over the age of ten (10) years, and did then and there unlawfully, feloniously, forcibly and against the will of her, the said DOROTHY MAY WHEELER, feloniously ravish and carnally know *her, the said* DOROTHY MAY WHEELER, contrary to the form of the statutes in such case made and provided, to the evil example of all others in like case offending, and against the peace and dignity of the State of Florida.

That as averred in the citation, a motion was made to quash the indictment in Case 856, the ruling upon which would control in the other cases mentioned. Whereupon the representative of the State Attorney's Office stated in effect that he believed the original indictment was in proper form, but to eliminate any question he would have these defendants immediately re-indicted by the Grand Jury which was still then in session. And thereupon, the Judge of said Court did sustain the motion to quash with respect to Case No. 856.

These respondents are informed and believe and upon such information allege that the representative of the State Attorney's Office did not agree in open court that said indictment No. 856, as well as the others, were so defective as to make it advisable that the state not go to trial upon [fol. 16] said indictments, but merely made the suggestion that new indictments might well be obtained to remove doubt and question.

Further answering these respondents deny that they withheld the truth and say that they had no such intention to withhold the truth. These respondents deny that the said cartoon did or was intended or could be considered to apply to these rape cases to make more definite any imputation

implied by the editorial, or to impute or suggest that fair and impartial justice was not being done between the State of Florida and the defendants in the Rape Cases; and deny that the State of Florida was represented in said cartoon by the character known as "Public Interest" and was not being heard or recognized or favored, and deny that in said cartoon the defendants in the Rape Cases were represented by a large character on the bench beside the Judge, who was being heard, recognized and favored; further that said cartoon could have no reference to the said criminal indictments since the first indictments had been quashed and the second indictments had been returned and had not been dismissed.

Respondents deny generally all of the statements in said paragraph (A) not herein specifically admitted.

3. Specifically answering the paragraph (B) entitled "Brook Club Case", these respondents deny the said cause was or is pending; on the contrary, they show that the same was terminated by final decree on October 31, 1944, when said cause was dismissed, as appears in said citation. They deny that no testimony was taken in said case by the State Attorney. On the contrary respondents are informed and believe and upon such information allege that on the hearing for preliminary injunction, where defendants were repre-
[fol. 17] sented by counsel, witness were sworn and testified for plaintiff; that the court by its order dated April 25, 1944, recited that "The court having considered the evidence submitted by the plaintiff, none having been offered by the defendants"; after which recital the Court granted the temporary injunction. Further in respect of the notice alleged in this citation to have been given State Attorney Stanley Milledge, setting the case for hearing for final decree on October 31, 1944, respondents are informed and believe and upon such information allege as follows:

The State Attorney upon receipt of said notice immediately notified both the secretary to Judge Wiseheart and counsel for the Brook Club that the grand jury was reconvening on October 30, 1944, at 10 A. M. that the State Attorney would be engaged with the grand jury from day to day until it was discharged some time prior to the end of its term on November 13, 1944, that the State Attorney could not be present before Judge Wiseheart on the stated date but he could be present at any

time after the grand jury had been discharged. The foreman of the grand jury had set October 30, 1944, for reconvening of the grand jury long before the notice of the final hearing was given by counsel for the Brook Club, and the State Attorney had already issued subpoenas for witnesses to appear before the grand jury on the said date and upon said date the State Attorney did personally examine a number of said witnesses before the Grand Jury in connection with the returning of indictments for violation of criminal laws of the State. The State Attorney requested that the hearing in this Brook Club case be deferred and did not understand that under the foregoing circumstances a hearing would be had in his absence. The State Attorney could not delegate either of his two assist-
[fol. 18] ants to appear before Judge Wiseheart in the Brook Club suit because the State Attorney had personally handled the case and neither assistant was familiar therewith. Notwithstanding this, the case was heard in his absence and dismissed.

Still further respondents are informed and believe and upon such information allege that by long practice and custom indulged in by all the judges in Dade County, Florida, one judge, except in cases of grave emergency, will not take over and dispose of the case of another judge where there is a contest and testimony has been taken and an injunction already issued. Whether or not Judge Holt was absent from the circuit on October 31, 1944, these respondents are not advised. In any event no grave emergency existed requiring transfer of the case to another judge. Respondents are informed and believe and upon such information allege that on October 31, 1944, the Brook Club would normally have been closed and would not have opened until January; that in fact, it had been closed throughout the summer, that notwithstanding these facts the case was set by opposing counsel for final hearing on the day that the State Attorney was engrossed in his duties before the grand jury and the cause was thereupon on said day dismissed. There were no suggestions in said editorial that the case was set or brought on for hearing by the judge but that, after many months' delay, it was heard when important duties before the grand jury precluded the State Attorney from appearing for the State.

These respondents deny any intent by either said editorial or said cartoon either in words or otherwise to interfere [fol. 19] with fair and impartial justice in the State of Florida and deny that the large character in the cartoon was beside the judge and on the bench and being heard, recognized and favored, but, on the contrary, these respondents respectfully show that it was the intention of said editorial and said cartoon to condemn and criticise the system of pleading and practice and procedure created by the laws of Florida, whereby such cases could long be delayed and then could be dismissed upon technical grounds in the manner herein shown. These respondents further say that it has long been well known of which matter this Court will take judicial knowledge, that the system of pleading and practice and procedure, particularly in chancery causes, as the same prevails in the State of Florida, is not modern and it thereby makes possible great delays and technical defenses which are not recognized, favored or allowed under the more modern systems of pleading practice and procedure prevailing in other states; and that the adoption of this improved procedure has been advocated for many years by prominent members of the Bench and Bar before the Supreme Court of Florida.

And further answering, these respondents deny that said editorial of November 7, 1944, entitled "Why People Wonder," created any clear and present danger to the administration of justice in Florida, but, on the contrary, these respondents aver that it was the intent of said editorial to criticize the system of procedure adopted under the laws of Florida, whereby delays and technicalities are permitted to defendants. Respondents deny generally all of the statements in said paragraph "B" not herein specifically admitted.

[fol. 20] 4. Further answering paragraph entitled (C) "Tee Pee Club Case," these respondents deny the making or intention to make any false imputations by either said editorial or the said cartoon; they deny that there was any representation by said cartoon that the defendants, represented by the large character in the cartoon, were beside the Judge or that he was on the bench or that he was being heard, recognized and favored, or that the character denominated "public interest" was being not heard, recognized or favored. They aver that the said cartoon

did not have any reference to the Tee Pee Club case and could not by any fair intendment be held to refer to the Tee Pee Club case in any respect. On the contrary, these respondents aver that it was the intent, as expressed in said editorials, to convey the meaning that plain people were confused and were shaking their heads in futile wonderment that the system of laws, pleading, practice and procedure should permit and compel the judiciary to uphold defendants' technical defenses and be compelled to grant dismissals upon technical rather than substantive grounds.

Respondents are informed and believe and upon such information allege that as a matter of fact it has long been the practice both by common usage and by practice in the State of Florida, to sustain and grant temporary injunctions and receiverships solely upon affidavits, and that in fact and in truth said judge in refusing to consider the affidavits submitted in support of the application for said injunction, was acting contrary to the practice usually pursued in such cases. These respondents further aver that [fol. 21] the said editorial, in commenting upon said matter, was referring to an order signed October 10, 1944, by the Honorable George E. Holt, duly recorded in Chancery Order Book 702, page 455, records of said Court, denying plaintiff's motion for temporary injunction, and the further order of said court bearing date October 12, 1944, denying the motion of the State Attorney to set aside the order denying the injunction, and which said matter so commented upon referred to the past act of the said court in so denying said injunction and refusing a rehearing thereof and upon which the public and these respondents had a privilege to freely comment and that said comment could not create any clear and present danger to the administration of justice in the said court. Respondents deny generally all of the statements in said paragraph "C" not herein specifically admitted.

5. Further answering the citation in its entirety, these respondents show that conditions with respect to law enforcement in Dade County, Florida, are not good and that in many respects the machinery for law enforcement has broken down and the system has been subjected to widespread public comment and criticism and that such conditions existed at the time of these editorials. It became

the right, if not the duty, of citizens and of vehicles of public information including respondents herein to call attention to these conditions and to comment upon the same to the end that improvements might be made. This general situation and the public concern therewith is reflected in the report of the grand jury of the Circuit Court of Dade County, Florida, to this court, dated on or about November 13, 1944, a copy of which is hereto attached [fol. 22] marked Exhibit "C" and by reference made a part hereof. This report calls attention to the breakdown in law enforcement, to the widespread existence of illegal gambling activities, to the danger which these conditions engender and states in part as follows:

> The general purport of the report is to indict a system of law enforcement of the gambling laws, called the "liberal policy." We have tried to show what this policy is, and its consequences. We have made several concrete recommendations, but fundamentally what we are driving at is to make the situation clear in the hope that an informed public opinion, which is the only possible basis for good government, will exert the pressure necessary to bring lasting improvement.
>
> There are zones of gambling operations, both as to areas and as to kinds of gambling; for example, one syndicate operates only in Miami Beach and another syndicate operates only on the mainland. While a few small independent gambling operators are tolerated, the business as a whole is well organized and controlled.
>
> It seems clear that the Vice Squad, now called the Moral Squad, was invented to facilitate political con- [fol. 23] trol over gambling. All other policemen have for years been given thoroughly to understand that they are not to enforce these laws.
>
> The close organization of the gambling racket requires the participation of only a few people, and they have every incentive to deny the payments of bribes and none to testify truthfully. These men have never had any reason to fear penitentiary sentences for their operation of gambling rackets. If a few of them were sent to the penitentiary, and all the others feared pros-

ecution, it could reasonably be expected that some of these big gamblers would turn state's evidence and testify.

The machinery of society for combatting crime is its police, prosecutors and courts. These agencies can not combat crime unless they believe in combatting crime and are sincerely trying to do so.

We found no effort by any officer except the State Attorney to obtain evidence against the big gamblers. We emphasize the fact that the existence of organized [fol. 24] rackets is not due to lack of men—it is due to lack of desire. It is perfectly absurd to claim that the police, prosecutors and courts could not deal with this situation. We are thoroughly convinced that the statements of several police officers are true when they said that an organized racket cannot possibly exist without political protection.

The municipal police mostly handle the cases within the municipalities, and the sheriff's office the cases arising in the "County". In the latter case, the fines imposed by the state courts go into the County's Fine and Forfeiture Fund. The same "liberal policy" applies here as in the city. The fines are larger, but the arrests are less frequent, and the chances of the defendants being dismissed before trial are excell[illegible]

The system of prosecuting one man for a felony and another for violating a city ordinance on the same kind of offense, depending merely upon place of occurrence, naturally suggests law enforcement for revenue only.

The term "liberal policy" has been coined, locally, [fol. 25] to give a nice name to a system of permitting violation of the laws for the profit (huge profits) of those permitted to do so * * *.

And we can see that by the continued progress of attracting more and more undesirables we might eventually acquire a national reputation which would cripple the wholesome future development of the area not only industrially and as a resort area.

> Even if it were true that there is some economic gain from the rackets this could not justify a complacent surrender of our community dignity and self-respect.
>
> We are convinced that a vast improvement in our local government, generally, as well as in law enforcement in particular, could be obtained and maintained if civic-minded individuals and organizations took an active and sustained interest in this subject. We do not mean some mere passing of regulations—we mean a thorough examination into various phases of our local government so that its actual operations can be understood. We suggest that each civic group undertake to acquire first-hand information as to some partic-
> [fol. 26] ular part of our local government so that this information could be available not only to its own members but to other civic groups and the public at large through the cooperation of the newspapers. By a constant interchange of this kind, public information as to the conduct of its business would soon become well informed.
>
> We note some indications that the gambling racketeers are proceeding with expensive preparations apparently on the assumption that those in authority are favorably inclined.

Under the legislative recommendations and comments with respect thereto, after recommending that the statute Law be amended to make proof simpler and presumptions more favorable to the State and recommending that procedure be rendered more efficient, this comment is made:

> The laws generally are all in favor of the criminals. We agree with the State Attorney that more consideration should be given to the protection of society. There are entirely too many loopholes.

Under these circumstances, it is respectfully shown that citizens of Dade County and those whose business or pro-
[fol. 27] fession it is to disseminate information to the public, had the right if not the duty openly and forcefully to discuss these conditions to the end that these evils that are profoundly disturbing to the citizens of this county, might

be remedied. The publications complained of did nothing more than discuss the generally recognized weakness and breakdown in the system of law enforcement and call for its improvement.

These respondents do invoke and rely upon a freedom of speech and of the press so unequivocally preserved for them by the Constitution of the United States and of the State of Florida.

Any matter or thing in said citation contained not herein specifically denied or admitted is hereby expressly denied.

And now having fully answered the said citation, the respondents pray that the same be discharged and dismissed.

Robt. R. Milam, Milam, McIlvaine & Milam, Attorneys for Respondents; Elisha Hanson, Of Counsel for Respondents.

[fol. 28] *Duly sworn to by John D. Pennekamp and James L. Knight. Jurat omitted in printing.*

[fol. 29] EXHIBIT "6" TO RETURN OF RESPONDENTS

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR THE COUNTY OF DADE, SPRING TERM, A. D. 1944

Report of the Grand Jury

To the Honorable Judges of the Above Styled Court:

We, the Grand Jury, duly impaneled and sworn to inquire in and for the body of the County of Dade, impaneled at the Spring Term, A. D. 1944, of the Circuit Court of the Eleventh Judicial Circuit of Florida, respectfully report to the Court that we were convened on May 15, 1944. William P. Baird was appointed Foreman by the Court and C. M. Long was appointed Vice-Foreman. J. E. Bandy was designated as Clerk. Shortly thereafter we started the investigation of capital cases.

We have considered capital cases against eighteen (18) persons, some of whom are in jail and one for whom the

authorities are searching. We have returned the following indictments:

Murder in the first degree	8
Murder in the second degree	1
Manslaughter	1
Rape	10
Total	20

We have also considered other cases and returned indictments against 8 persons as follows:

Perjury	1
Gambling	4
Bribery	2
Crime against nature	1
Total	8

[fol. 30] Grand Jury Report on Gambling Investigations in Dade County

The Grand Jury has made an extended investigation of organized gambling in Dade County, but so great is the field necessary to cover that time did not permit as thorough inquiry in the other municipalities which permit organized gambling as was made in Miami.

The investigation covered more than 1500 pages of testimony, which included that of all five members of the Miami City Commission, the City Manager, the Director of Public Safety, the Municipal Judge, the present and two former Chiefs of Police, all of Miami, fifteen City of Miami police officers of various rank, the Sheriff of Dade County and his Chief Deputy, County Solicitor and one of his assistants, three unsuccessful candidates for the City Commission, representatives of the Southern Bell Telephone & Telegraph Company and of the Western Union Telegraph Company, local representatives of the "wire service" which supplies local gamblers with racing information, two lawyers who represent some of the big gamblers, and sixteen gamblers, both big and small, and a number of other persons.

The facts in this report are taken from the transcript of testimony taken before the Committee or the State Attorney

on subpoenas of the latter; from a study of official records and from our own observation and experience. While the report is critical of the conduct of a number of public offices, we have deliberately understated the situation whenever particular offices are referred to. For the most part we have confined statements of fact relating to any particu-
[fol. 31] lar office to what the holder of the office himself said.

The general purpose of the report is to indict a system of law enforcement of the gambling laws, called the "liberal policy". We have tried to show what this policy is, and its consequences. We have made several concrete recommendations, but fundamentally what we are driving at is to make the situation clear in the hope that an informed public opinion, which is the only possible basis for good government, will exert the pressure necessary to bring lasting improvement.

The testimony of witnesses upon which indictments were returned is not referred to in this report and constitutes no part of it.

There are zones of gambling operations, both as to areas and as to kinds of gambling; for example, one syndicate operates only in Miami Beach and another syndicate operates only on the mainland. While a few small independent gambling operators are tolerated, the business as a whole is well organized and controlled. By organization a few big gamblers make the necessary arrangements with a few politicians. These big operators do not personally run the gambling joints they control. In some locations they hire employees and in others they form a partnership with the smaller gamblers who personally run the place on a partnership basis. The big gambler, referred to as the "bankroll", gets 50% of the net profit after all expenses of operation are deducted, including rent, salaries, telephones, "wire service", fines, bail bonds, lawyers' fees, accountants' fees and the other items that constitute expenses of conducting an illegal operation. While a few policemen, mainly members of the Vice Squad, have engaged in petty chiseling, we [fol. 32] are convinced that a great majority of policemen receive no profit out of the racket. In fact, few of them are in a position to get graft if they wanted it.

The organization of the law enforcement machinery, which, of course, is concerned with gambling as well as

other criminal laws, is quite complicated. So complicated is it that most people do not understand just how it operates and whom to hold responsible.

City police are supposed to enforce all state laws and municipal ordinances within their city limits. The same offense is frequently a violation of both state law and municipal ordinances. When this occurs proper practice is to prosecute for violation of state law in the state courts as the punishment is more severe. As to gambling cases, however, the practice has been both in Miami and Miami Beach for the police officer to bring such cases only in their city courts, which of course can punish only for violating a city ordinance. The reason for this is clear—their bosses, the city council or commission, want the revenue to come into their city treasuries.

Policing in the areas outside any municipality is done by the Sheriff and his deputies and by the Constable of the district. The Sheriff can arrest anywhere in the county but he concentrates his men in the areas that are not covered by City police. The Constable usually brings his cases before his Justice of the Peace, who, if possible cause to prosecute is shown, binds over the defendant for prosecution in one of the three State courts having original jurisdiction. The Sheriff's cases are turned over to the County [fol. 33] Solicitor, who has the sole power to prosecute in the Court of Crimes and the Criminal Court of Record, except where punishment may be death, when the State Attorney prosecutes on Grand Jury Indictment in the Circuit Court.

The State Attorney can prosecute only after Grand Jury indictment, but the County Solicitor prefers his own charges, after considering the evidence. This officer is often referred to as a one man Grand Jury because as to all except capital cases, he, by himself, can do what the Grand Jury can do in returning indictments. This together with his power to summon witnesses before him and examine them under oath, makes the County Solicitor a very powerful officer. All gambling cases, prosecuted as a violation of State law, must be prosecuted by his office. All such prosecutions must be commenced by information which can only be filed by the County Solicitor. This is true even when the Grand Jury indicts. The County Solicitor and the State Attorney are permitted by law to dismiss any case even after prosecu-

tion has begun. When fines are imposed in the State Courts they go into the Fine and Forfeiture Fund of the County. The Sheriff, Constable, Justice of the Peace, State Attorney and County Solicitor and the State Court Judges are elective officials. All municipal police from the Safety Director down are appointed, as is also the City Judge, under the administrative powers of the City.

All of this confusing system of law enforcement makes it very difficult for the average citizen to fix responsibility. Over all responsibility for satisfactory results is in fact divided. This makes it easier for those sharing the re- [fol. 34] sponsibility to "pass the buck". To make such a system function with even moderate success, requires that all officials and officers charged with a duty, possess a sincere desire to cooperate in combatting all crime. The presence of a form of law violation, which yields, tremendous profits naturally invites laxity. Laxity of law enforcement in one field induces laxity in others, by countless subtle means.

Until quite recently the handling of gambling law violations has not been under the sole jurisdiction of the Miami Chief of Police. Guy Reeves, who was Chief of Police from 1928 until 1932, was not permitted by the City Commission to exercise any power whatever over this type of law enforcement. Since that time there has been constant interference from City Commissioners as to the enforcement of the gambling laws. One City Commissioner testified that he put a certain police officer on the head of the Vice Squad as a reward for the latter's political services during the preceding City campaign. While other City Commissioners have not been as frank, we are satisfied that the one referred to is not alone in this respect. It seems clear that the Vice Squad, now called the Moral Squad, was invested to facilitate political control over gambling. All other policemen have for years been given thoroughly to understand that they are not to enforce these laws.

Another aspect of this policy is observed in the customary practice of horse bookies pleading guilty, accepting fines and returning immediately to work. When this practice [fol. 35] prevailed, it can safely be assumed that the policy is satisfactory to the big gamblers who are actually the ones who pay the fines of their small fry. By having some cases for the newspapers to publish every day or two this method

creates the public impression that the laws are being enforced.

A result of political handling and control of gambling is that two positions on the police force are considered by policemen to be hot spots and undesirable for an officer who wishes to preserve his reputation and his job. These are the head of the Vice Squad and the Chief of Police. Recently, when Chief Quigg was removed, no senior officer on the force wanted the job. This job is a hot spot because the Chief has been technically recognized for all law enforcement and yet is not permitted the authority to do so. The Chief of Police can lose his job for permitting the very conditions which were politically forced on him.

The Vice Squad has, from time to time, functioned in different ways. Occasionally it has been in the hands of officers who cracked down on the gamblers, and during such periods, it is interesting to note that the gamblers ceased to plead guilty and fought the cases bitterly. Usually the Vice Squad operated on a "liberal policy" but sometimes in a non-discriminatory way, that is they did not arrest the little gamblers any more than they did the big gamblers. At other times, the Vice Squad has operated on the basis of "liberality" as to some of the big gamblers and very severe policy as to the little gamblers and even some of the big ones not then in political favor. Whatever method the Vice Squad followed at any particular time depended on the political desires of the political sponsor of that particular [fol. 36] head of the Vice Squad. The Vice Squad can and has induced some of the little operators to give up business for themselves and get one of the big fellows to "bankroll" him. He finds that 50% of the net profits under the latter arrangement yields more returns than the 100% he got before. The method used to persuade the little fellow to do this is illustrated by the man who was raided 9 times in 8 days while across the street another bookie had not been molested in years.

The officials acts of the Miami City Commission speaks its policy on enforcement of the vice laws. This past year the Commissioners stated in their budget that they expected to receive $170,000 in fines and forfeitures. This could be obtained only by allowing gambling houses to operate. A farmer who intends to butcher all his cows expects no milk. The police understand (as well as any intelligent per-

son could) that the Commissioners expect them and the Municipal Court as a joint collection agency to raise the revenue stated. Apparently the police never considered bringing gambling house operators to trial in the State court which has jurisdiction over felonies.

The "wire service" and the telephones are the life blood of the horse booking racket. The "wire service", national in scope, is a net work of leased circuits from the many horse track locations to centers of population where the politicians permit book-making. The circuit to Miami is leased by Postal Telegraph Company, now a part of the Western Union Company. From its present terminus at 544 N. W. 2nd Avenue it is distributed over the local telephone system to the various bookmakers. Charges for the service depends upon the volume of business done by the [fol. 37] customers. Wire service charges fluctuate greatly, suggesting that political campaign donations and the like are added to the cost of distributing up to the minute horse racing information.

The State Manager of the Southern Bell Telephone Company has offered to cooperate with law enforcement authorities in so far as the Company can do so without itself assuming the role of policeman. The State Attorney has informed us that he will request the Telephone Company to discontinue furnishing telephone service to the "wire service" locations and will cooperate with and assist the Company in defending its legal right to do this against any attack that may be made in the Courts. We commend the State Attorney for this and to strengthen his request, we heartily join him in it and request the full support and cooperation of the Southern Bell Telephone & Telegraph Company.

While we are aware of the fact that the dissemination of racing information has been held legal by our courts, nevertheless this business exists only to further an illegal operation. In fact without it, the organized racket would disintegrate, although bookmaking on a restricted, sneak basis might continue, It would certainly cease to be a political power.

In view of the fact that the Bell Telephone Company discontinued its leasing of circuits for this purpose a number of years ago on the request of the Department of Justice, we now request the Western Union Telegraph Company to

[fol. 38] discontinue this practice also. Aside from the purpose to which this "wire service" is used, it seems clear that the legitimate needs of the public for these facilities is a strong added reason for this request. We cannot understand leasing wire circuits to convey gambling information while general public use of these facilities is restricted.

Another device in Miami which is undesirable is the manner of selecting a municipal judge. The Miami municipal judge is appointed by the Commission from election to election, or for two years. Who is going to be appointed is an unpublished but potent campaign consideration. One commissioner testified that many people asked him if he would vote for a particular man for judge, if elected commissioner. On the response being favorable the support followed. The testimony reveals instances of direct interference by commissioners, but the full extent of this is difficult to determine. At all events, the city judge is in a position where commissioners can tell him what to do, but still disclaim all responsibility for his actions or even knowledge of them. The city judge should be entirely freed of political control by the Commission by holding an independent elective office.

The "liberal policy" of enforcing gambling laws has also applied in Miami Beach, Hialeah and in the unincorporated areas. As we said in the beginning, time did not permit a detailed examination as to Miami Beach and Hialeah, but, basically, the same system of political handling of the gambling situation is quite evident.

The very presence of gambling naturally suggests the existence of some bribery. In the very nature of the crime [fol. 39] bribery is extremely difficult to prove. The close organization of the gambling racket requires the participation of only a few people, and they have every incentive to deny the payments of bribes and none to testify truthfully. These men have never had any reason to fear penitentiary sentences for their operation of gambling rackets. If a few of them were sent to the penitentiary, and all the others feared prosecution, it could reasonably be expected that some of these big gamblers would turn state's evidence and testify.

The big gamblers have innumerable ways of rewarding their friends besides outright bribery. If the recipient of their favors is a lawyer he can earn very handsome fees for

handling real estate transactions and in other purely civil matters. If the recipient is a business man every profitable but technically legal business transactions can come his way. So far as the results to the public are concerned it makes little difference as to what it takes to get the politicians to carry out the policy of the rackets. The result is the same whether or not an official takes graft in addition to campaign funds and political support.

The only effective way of eliminating corruption is to destroy the source of the corruption. We realize, of course, that it is no more reasonable to think that gambling can be entirely eliminated than it is to think that murder, or robbery, can be eliminated. The war against crime must constantly be waged, as crime is always present in varying degrees. The machinery of society for combatting crime is its police, prosecutors and courts. These agencies can-[fol. 40] not combat crime unless they believe in combatting crime and are sincerely trying to do so.

The testimony before us conclusively proves that the organized gambling racket can be destroyed and that this can be done even with the facilities now at hand. The main if not the only thing which stands in the way of destroying the rackets is that some of those charged with the duty of enforcing the gambling, as well as other laws, do not desire to do so. If all law enforcement agencies decided to enforce the gambling laws, we venture the prediction that 90% of the gamblers in this vicinity would leave [illegible] manently over night. One gambler testified that he quit business last April because he had heard that one bookie got a ten-day jail sentence. He had been booking here in one location for sixteen years, but just this much of a jail threat was enough for him. Every law enforcement officer, except the County Solicitor, stated that the imposition of only a few jail and penitentiary sentences would suffice to break up the racket. Two Miami police officers testified that if given a free hand they could close and keep closed all open gambling in Miami. Most police officers would be highly delighted to see the rackets destroyed and kept out of this community, as they know that this is the only way to keep politics out of the police department.

We found no effort by any officer except the State Attorney to obtain evidence against the big gamblers. We emphasize the fact that the existence of organized rackets is not due to lack of men—it is due to lack of desire. It is

perfectly absurd to claim that the police, prosecutors and courts could not deal with this situation. We are thoroughly convinced that the statements of several police [fol. 41] officers are true when they said that an organized racket could not possibly exist without political protection.

To illustrate what the "liberal policy" has produced, and can produce again, we cite the case of former police officer Huttoe, for years head of the Vice Squad and one of the principals in the much publicized Quigg-Huttoe "feud." He appeared, at his own request, before an investigating Committee and the State Attorney. Other than permanent records no source except his own voluntary statement is used in this portion of our report.

About 1935 he was first assigned to vice work. His rise in political and financial importance started at about the same time. He played politics in the police department, with the City Commissioners, and with candidates for the Commission. He says, he "had to" do this. He was ambitious to get promoted. He sought the favor of the Civil Service Board Attorney, and had some mutually profitable business dealings with a Board member. He passed his civil service examinations first for Sergeant and then Lieutenant, concerning the legality of which there was some controversy but nothing came of it. We do not criticize the present work of the Civil Service Board, but there must have been something wrong then, as a photostatic copy of a part of Huttoe's examination (in his own handwriting), made a part hereof, clearly indicates.

Huttoe recounted some of his duties in connection with his vice work. One incident was being sent out to get voters, by affidavit, to remove their names from petitions for the recall of City Commissioners. In connection with this same chore, he related being sent to a particular City [fol. 42] Commissioner to use his "influence" to get the City Clerk fired. His account of how he did this—"I did not feel like that. I went and told (this Commissioner) that I felt he should not fire him and insisted he could not fire him."

This officer freely stated that he was on excellent personal terms with several of the big gamblers, visiting back and forth. In this way he acquired a great deal of what he calls "information." What this consisted of, and how he got it, is reflected in the following from the record of Huttoe's gambling and sordid story to our Committee: "I have

had gamblers sit down and talk to me and tell me about different pay offs and different things. I have a piece of paper where I have jotted it down while they were running the Royal Palm Club, they were paying somewhere in the neighborhood of $7,000 a week graft. In other words, they had money besides that. They had a bunch of politicians on the payroll running anywhere from $8 to $25 each. Then the politicians called up Art and said: "I have a man I would like you to put on." How much they got depended on how much political influence they had. Besides that the "city" was supposed to get I think $3250 a week pay off and the "county" $3150 and that did not include constables and justices of the peace if they got any."

And another quotation from Huttoe—"Take anyone on the vice squad and any gambler, especially Padgett, likes to tell how much influence he has. He told me when drunk about pay offs and who he paid and where he made it and all about it."

We think it can — reasonably assumed that big gamblers do not freely regale the head of the Vice Squad with such "information" if they think he is interested in sending them to the penitentiary.

[fol. 43] As with most police officers struggling along on a small salary, Huttoe used to have financial troubles, necessitating small salary loans as recently as 1935. By 1940 he had become a Lieutenant of police, and he had progressed financially enough to report in his income tax return for that year, in addition to his official salary, the sum of $3700, which was received from a well-known gambler. Huttoe's explanation was that he won an election bet, and if his election judgment had been bad the gambler was entitled to $5800 of the Vice Squad leader's money. Even as explained, the act constituted a felony. It is useless now to indict since the statute of limitations has run. We call to the attention of the Chief of Police that the statute does not run as to removal from the police department. This man should have been removed years ago. If the evidence on the charges upon which he was dismissed in August, 1944 by the New Miami Director of Public Safety, Captain Dan D. Rosenfelder, proves insufficient new charges should be preferred, as this man should not be given the power of a police officer.

Huttoe could not have achieved political power and have carried on this wide range of activities for nine years

without political sponsors. He, himself, asserted that the charges upon which he was afterward fired in August 1944 concerned his political activities, which were well known long before his reassignment to leadership of the Vice Squad in June 1943, over the objection of the Chief of Police. Aside from testimony on the subject, this sequence of events tells the old story of political handling of the gambling situation.

Nominally, Lieutenant Huttoe was subject to the orders of the Chief of Police, but he recounts that when the Chief [fol. 44] ordered him to close a certain gambling place he replied: "You just tell them, I am not going to knock them off tonight; I might not for a week. I don't know what I am going to do yet."

In this connection we call attention to an unwillingness of several City of Miami Commissioners to shoulder their responsibility for the police politics. The Miami City Commissioners have acted as though the so-called "feud" between former Chief Quigg and Huttoe had nothing to do with them and that they had no responsibility for it. There will be no more feuding if the Commissioners will insist on good results and leave the method of obtaining them to the administrative police officers. The testimony of one of the Commissioners showed a shocking ignorance of actual conditions, although he publicly advocates the cure for them.

Some of these gentlemen seem to forget that the City Manager form of government does not absolve them of responsibility. They hire and can fire the City Manager, who, as the administrative head of the City's business is responsible for the police department through a Safety Director, whom the Manager can hire and then fire if he fails to do his job. The City Manager is not responsible to the people; he is responsible to the Commission. The Commissioners, and they alone, are directly responsible to the people not only for their legislative duties in passing ordinances but in understanding and evaluating the administrative work. We urge the City Commissioners to learn more about how the police department functions, through the department reports, however, and not by interference with police work. We urge that this interest manifest itself by keeping the department out of politics, by

[fol. 45] providing funds for an adequate and modernized police force with pay sufficient to attract and hold the right type of men, and with enough pay and security of position to remove the temptation to chisel.

We recommend to succeeding Grand Juries a continuing inquiry into the political handling of law enforcement, wherever it may appear, for law enforcement and politics will not mix. We urge all appointive law enforcement officers of whatever agency to report to succeeding Grand Juries all improper political interferences with their official duties. We hope there is an end to the conditions under which a man must choose between violating his oath of office or losing his job. We urge officers to stick to their oaths, and enlist the aid of the Grand Jury when any pressure is exerted to make them violate their oaths of office.

We commend Safety Director Rosenfelder for a fine beginning at the job of reorganizing a police department which was badly demoralized as a result of politics. Particularly do we commend his training and employment of negro police for patrolling the negro section. The results have been remarkable. Since September 1, 1944, the State Attorney's office reports a reduction in homicides from this section of nearly 50%, directly attributable to this constructive step.

We are also favorably impressed with Chief C. O. Nelson, a retired Inspector of police in New York, who has lived here five years. He is not interested in playing politics. We believe that if let alone politically Rosenfelder and Nelson will do a good and gadly needed job. We also believe that these men will resign rather than permit political interference with their duties.

[fol. 46] We believe that Mr. Rosenfelder and Chief Nelson are doing their best to destroy the organized rackets and they have already achieved a fair measure of success. We believe that they will make continued improvements in this field as well as in all other fields of law enforcement. We must observe, however, that the old habits of some — their men, trained in the Huttoe school of law enforcement, are not easily broken. We observe one example of this in the failure to deal with slot machine violations. While technically these machines, by virtue of the legislative joker slipped through at the 1941 session are not, in themselves,

illegal, everyone knows that these machines are actually gambling devices, as no profit could be derived from them otherwise. It is possible to obtain evidence that the occasional winning player gets paid off over the counter, yet the morals squad is doing little or nothing about this kind of violation. We urge all Chiefs of police, constables, the Sheriff and his deputies to take prompt steps as to this particularly pernicious racket, which operates on precisely the same principle as bookmaking does. The machines are owned by various companies, who service and maintain the machines, pay the licenses on them, and divide the net profits fifty-fifty with the location operators. In all the various forms of gambling the player is a sucker who cannot win over any period of time, but in playing the slot machines he has virtually no chance whatever since the machines are set not for gambling but for robbery. These machines are also particularly vicious because they are under the very noses of children wherever they go, producing demoralizing influence both as to educating the children to become gamblers and educating them to disrespect the [fol. 47] law. We urge the reinstatement of the 1937 law outlawing slot machines, but meanwhile we urge the police officers of the various law enforcement offices to increase their vigilance.

The "liberal policy" is observable in the practice of municipal police officers bringing gambling cases occurring within the city into the municipal court and not in the state courts having jurisdiction over felonies. The felony of operating a gambling house if committed with- the City of Miami is not prosecuted as such but as a violation *qn* of a municipal ordinance. The same felony occur-ing across the street but outside the city limits is brought in a felony court. The municipal police mostly handle the cases within the municipalities, and the sheriff's office the cases arising in the "County." In the latter case, the fines imposed by the state courts go into the County's Fine and Forfeiture Fund. The same "liberal policy" applies here as in the city. The fines are larger, but the arrests are less frequent, and the chances of the defendants' being dismissed before trial are excellent.

In the "County" cases the defendants are usually arrested by deputy sheriffs, booked at the county jail and

released upon their filing bond, currently in the amount of $500, to insure their appearance at the trial. The evidence obtained is presented to the County Solicitor, whose duty it is to file an information, charging the arrested persons with whatever offense, if any, the evidence warrants. In a preceding part of this report we have already indicated the power that resides in the office of County Solicitor. The [fol. 48] defendants plead to this information, as in other criminal cases, and the case proceeds to trial on the date set by the court. Fines when imposed go into the County treasury, as distinguished from the fines imposed in city court which go into the city treasury.

The system of prosecuting one man for a felony and another for violating a city ordinance on the same kind of offense, depending merely upon place of occurrence, naturally suggests law enforcement for revenue only. In order to make a detailed comparison between the records of the cases handled by the City of Miami and the cases handled by the County Solicitor, the Grand Jury's committee, earlier in its investigation last June, requested the Solicitor to furnish data on all such cases handled by him for a two-year period. This the County Solicitor refused to do. The Committee -en procured as much of this information as was available from the public records from the clerk of the court, the expense being paid by the County Commissioners. This data of the gambling felony cases covered the two-year period ending July 1 1944. When this record was examined the reason for the Solicitor's unwillingness to have his records examined became apparent. The record referred to over 132 felony cases where the evidence obtained was submitted to the Solicitor for further action. Of ~se 132 cases 30 were dismissed in full by the Solicitor. In 16 of them where the defendants were charged with a misdemeanor, as well as a felony, the felony charges were dismissed, and in 9 instances the Solicitor did not file any information at all. This makes a total of 55 cases out of 132, or 41½ per cent in which the court or jury did not pass on the guilt or innocence of the persons arrested or charged.

[fol. 49] Tabulation of the 132 cases in Criminal Court of Record (having jurisdiction over gambling felony cases)

for period July 1, 1942 to July 1, 1944, as taken from Court Records.

Nolle prossed (dismissed) as to all charges	30
Nolle prossed as to felony charge, leaving misdemeanor (In 15 of which the defendants pleaded not guilty, waived jury, were convicted and received a suspended sentence, in one the defendant plead guilty to a misdemeanor and was fined $100 and costs)	16
No information filed	9
Equals 41½% of total number of cases	55

The Remaining Cases

Acquitted after trial	5
County Solicitor accepted plea of guilty to misdemeanor and all defendants fined average of $93 each and costs	13
Defendants pleaded guilty to felony and fined an average of $162.50 and costs	10
Defendants pleaded not guilty or nolo contendere, waived jury, convicted of a felony and fined average of $217.10 and costs	47
Defendants pleaded not guilty, waived jury, found guilty of misdemeanor and fined costs only	1
Defendants pleaded not guilty, waived jury, convicted of a felony and sentenced to penitentiary for 6 [fol. 50] months	2
	78

The court files, of course, did not contain any information as to the Solicitor's reasons for dismissing or failing to file an information on these cases, since the law does not require a prosecutor to assign any reason for his dismissals of prosecutions. Our Committee then gave the County Solicitor a list of these 55 cases and requested him to bring before the Committee his office files on these 55 cases to determine, if possible his reasons for not completing these cases. Obviously, such a condition reflected a very sad state of law enforcement. If the evidence obtained was of such a poor quality that it was useless to prosecute, this fact should become known to the Grand Jury, as well as the Solicitor's reasons for starting prosecutions without suffi-

cient evidence. But whatever the cause this exceedingly high percentage of dismissals required further explanation.

In a few of these causes where the evidence was not furnished by law enforcement officers the witnesses had left the State and could not be obtained for trial. In the vast majority of cases, however, the County Solicitor's explanation of dismissals shows an extremely casual method of handling such cases. In many instances the Solicitor had no files whatever, and his explanations of his dismissals were vague and rambling, and in many cases he admitted that he was just guessing as to why certain cases were dismissed. In a number of instances he concluded that the evidence was insufficient or illegally obtained, and yet he also asserted that the deputy sheriffs who procured this evidence were competent and he found no fault with their work. We [fol. 51] cannot reconcile both of these statements. The Solicitor evidently considered the work of the deputy sheriffs competent since, based upon their evidence, he filed the informations in the first place.

We appreciate the fact that a prosecutor is not responsible for the sentence imposed by the court. We also are aware that lax prosecutions and frequent dismissals can also discourage the court from imposing stiff sentences on those cases left to its decision. Bringing to trial the big operators might also bring different sentences.

The examination of the 132 cases referred to showed on their face that the same gambling houses were frequently involved, and many of the defendants were repeaters Until it was called to his attention by the Committee the County Solicitor said he had not observed this peculiarity about his own cases. From the examination of a few gamblers the Grand Jury has learned the identity of at least one of the big gambling operators whose places and employees appeared from time to time in the record of the County Solicitor's cases. It was astounding to hear the Solicitor say that he did not know the identify of any of the big gamblers who controlled these places, and who employed the persons involved in the Solicitor's prosecutions, and he said that he knew of no way to find out. We quote from the record at the County Solicitor's appearance before our Committee:

Q. "Is the gambling business here in Dade County conducted mostly by independent operators or is it largely by syndicated groups?"

The Solicitor: "I don't know."

[fol. 52] Q. "Do you have any way of finding out?"

The Solicitor: "No sir."

Q. "Have you observed that over the course of years at certain locations arrests are constantly being made at the same places?"

The Solicitor: "I don't think so. You say they are constantly being made?"

Q. "Yes, at the same locations arrests are made from time to time, as for example, the Black Cat, 888 Red Road, that over a period of years a constant stream of men have been arrested, informed against, plead guilty of have been adjudicated guilty for operating in that same location."

The Solicitor: "I don't know."

Q. "You don't know whether that is true or not?"

The Solicitor: "No."

We observe that it is true as shown by the records of the Solicitor's cases.

A few moments later the following was said at the hearing:

Q. By a Grand Juror: "It is mostly local men, though, that are running these gambling organizations, isn't it?"

The Solicitor: "Some years ago, people who were interested—not financially, but who believed that there ought to be some gambling down here for tourists, also said we should not have any of these gangsters down here from big cities. That had happened in the past. From that time on, as I understand it, there have been no gangsters down here operating so far as anybody could tell."

We assume that the "people" the Solicitor referred to who were "interested" and were also in a position to deter-[fol. 53] mine the background and character of those permitted to violate the law, must have had some legal power to put their plan into effect. We also think we are correct in surmising that the gangsters who had operated here in the past could reasonably be expected to return to such a lush and inviting field.

The County Solicitor and his assistants are the only persons who can prosecute the big gambling operators in Dade County. The County Solicitor was the only witness called who stated that he knew of no way to get evidence against these big gamblers. With the exception of one or two gam-

blers he was the only witness who doubted whether penitentiary sentences would have any deterring effect upon organized gambling. He was also the only witness who doubted that injunctions of gambling houses would have much effect. He was the only law enforcement officer who did not know that imposing light fines does not deter organized gambling. The County Solicitor should have such knowledge.

The Solicitor's only plan for improved enforcement is to employ two or three hundred additional police and investigators, the reasons given being that gambling law violations are the result of human nature and that a majority of merchants in this area want open gambling as a tourist attraction.

This same explanation was formerly made as an excuse for not enforcing the laws against prostitution, which until the army and navy moved in, was an extensive racket itself. It was then contended by the "liberal" advocates that prostitution was human nature; that people generally approved of protitution and that it was impossible to break it up. About three years ago the army and navy put on [fol. 54] the pressure and insisted that houses of prostitution be eliminated. The old practice of periodic raids and fines for revenue only was immediately discontinued. Under the army and navy inspired methods the offenders were brought into the court which could deal most fairly with them, and they were given sentences calculated to break up houses of prostitution. Prostitution, of course, has not been entirely eliminated, but these methods did quickly succeed in destroying houses of prostitution, and they are not now and have not for years been in general operation in this community. We now hear no more the lame excuses on this subject of prostitution which the County Solicitor still makes as to the gambling houses.

We referred above to the County Solicitor's explanations concerning the 55 cases he dismissed and filed no charges in. Perhaps a better idea of the Solicitor's reasons could be obtained by quoting his own words on a few of them. The Solicitor was asked why no information was filed in the cases of State vs. Harry Jordan, # 11241, and State vs. John A. Watson. He replied: "We don't have any file on that; we couldn't find one on John A. Watson. I called the Sheriff's office and asked them who made

the arrest." To the question as to why the case of State vs. Leon Huff, # 11850, was nolle prossed (dismissed) the Solicitor answered: "Who nolle prossed that, do you know? Does it show? I don't know. Anyhow, the testimony shows that the deputies went there and opened the door. He pulled the hasp from over the staple and turned the knob. Just as he started in someone else came out and he went in. Huff was sitting at a desk or table. Because of illegal entry and insufficient evidence, the only reason I [fol. 55] can see, is why it was nolle prossed, which I think is what happened."

The Solicitor was asked why the felony charge in the case of State vs. J. H. Keathley, #11020, was dismissed. His explanation was: "The only thing I can go on is presumptions, because apparently Costello (Court Reporter) had this thing confused; that Eavenson (Chief's Deputy Sheriff) got in, opened the door or got in some way; an illegal entry. He wanted to make a plea to gambling. We took it. That is the only explanation I could guess at, because I don't know. Hubbard investigated the case and made the announcement in court, I think."

In the latter part of this presentment one of our legislative recommendations is that the power of any prosecutor to dismiss a pending case should be curtailed, and he should be required to state the facts before the court fully, by written motion, and obtain the court's approval before dismissal is permitted.

The County Solicitor should vigorously prosecute cases when the evidence presented to him is sufficient, and if insufficient he should interest himself in further investigation. He should use the evidence he gets, and should try to get more, so as to file injunction suits against regular gambling houses which so frequently appear on the record of his cases. He should, by using the same methods that the State Attorney and the Grand Jury have, obtain evidence against some, at least, of the big gamblers and make an honest effort to send them to the penitentiary. Purely as a by-product of this investigation into conditions generally, the Grand Jury and the State Attorney have developed evidence against several of these well-known big gamblers and have returned indictments. If the County Solicitor had done his full duty in the past it would have [fol. 56] been unnecessary for much of this Grand Jury's work to have been done at all. We have not tried to do all of

this work for the Solicitor, but we have done enough to establish, conclusively, that by the same methods available to the County Solicitor the requisite information to proceed can be obtained. We expect him to finish the job, and we specifically point out that this is his job and not that of the State Attorney or of the Grand Jury.

The term "liberal policy" has been coined, locally, to give a nice name to a system of permitting violation of the laws for the profit (hugh profits) of those permitted to do so, and the political advantage, financial g-n, or both, to those who g-e the permission. This would not be tolerated in any community unless a considerable number of influential citizens are convinced that the "liberal policy" brings money into their pockets, and the public, generally, is unaware of the disastrous consequences, and therefore apathetic.

That the existence of this "policy" is entirely a matter of politics, and has nothing to do with the technical difficulties involved, is demonstrated by the fact that the "liberal policy" is followed in Miami, Miami Beach and Hialeah, but not is Coral Gables, Miami Shore, Miami Springs, Biscayne Park, and other small towns. For example, there is not even a slot machine in Miami Shores, although, from time to time, a few blocks away there have been gambling joints of all kinds. The gambling racket simply does not come into any community where the officials are opposed to it, because it cannot be profitably operated under these conditions.

[fol. 57] The very existence of an organized racket means political connivance with it. Obviously, no politician is going to connive—at least for long—unless the gamblers will finance his campaign and make his political life agreeable and pleasant, and even profitable, in return for his "liberality." Hones- men in the law enforcement field become understandably resentful and bitter under a system in which industry and competence mean nothing in the way of advancement. An ambitious but conscientious policeman sees all around him the rewards of clever politics while he gets nothing for the suspicion of the public, who do not understand the situation. Under these conditions it is difficult to get the right men to run for elective office or even to accept appointive ones. The wonder is that there are any so long as a practice exists when any

man concerned with law enforcement is suspected of dishonesty.

Surely we do not expect that men content to be put into office, or kept there, with the money and influence of the gambling racket, will be able to perform their duties efficiently, even as to matters having nothing to do with the rackets. Why should the public expect that a man who had so little respect for himself that he would permit the rackets to put him in office would have enough respect for his City to serve it efficiently and faithfully as to its streets, parks, hospitals, or the development of its harbors? A man unable to keep faith with himself cannot keep faith with his community.

Since the only publicly announced argument in favor of the "liberal policy" is that it brings business, it should be remembered that the rackets did not build this or any other community—they merely prey on a prosperity that capital [fol. 58] and labor have already created. There is no indication that a gambling racket built the railroads to Miami, cleared the swamps, constructed the causeways and the buildings, built the airports and depots. The racket, while by no means destroyed, has fared worse during the past six months than it has in years, yet this has caused no economic depression. While it is undoubtedly true that some tourists come here for the vice attractions offered, our own observation and experience tells us that this is not true as to the majority of them. They come to enjoy the climate, the beaches, the fishing and the other wholesome sports and forms of recreation. When we Dade Countians become visitors we flock to the mountains of the Carolinas in the summer which are not noted for gambling houses.

There is no way of knowing how many very desirable visitors and permanent residents we lose in exchange for those whom our rackets do attract. We have no way of knowing how many industrial plants we discourage from locating here. We do have some way of knowing a little of the economic loss of attracting the undesirables—the cost of the increase in crime of all kinds—the increased costs of public hospitals and welfare organizations, etc. And we can see that by the continued process of attracting more and more undesirables we might eventually acquire a national reputation which would cripple the wholesome future development of the ar- not only industrially and as a resort area.

Even if it were true that there is some economic gain from the racket this could not justify a complacent surrender of. [fol. 59] our community dignity and self-respect. This would not justify our constant fears for the moral safety of our children, nor could it justify us in accepting the sacrifice of the men and women in uniform to safeguard us, if we are incapable of preserving a wholesome, honest home for them to return to.

By all means, let us have a liberal community, liberal in its freedom from prejudice and bogotry, liberal in building and maintaining parks, play grounds, hospitals, decent housing, libraries, a great university, concert halls, and the like. Let us be liberal for constructive things. And let us forget this nonsense that to be liberal means to be licentious; to substitute degradation for honesty and civic decency.

We are convinced that a vast improvement in our local government, generally, as well as in law enforcement in particular, could be obtained and maintained if civic-minded individuals and organizations took an active and sustained interest in this subject. We do not mean some more passing of resolutions—we mean a thorough examination into carious phases of our local government so that its actual operations can be understood. We suggest that each civic group undertake to acquire first-hand information as to some particular part of our local government so that this information could be available not only to its own members but to other civic groups and the public at large through the cooperation of the news-papers. By a constant interchange of this kind, public information as to the conduct of its business would soon become well informed.

We believe that no civic activity will yield greater dividends for the community than this. We appreciate this fact because our service on this Grand Jury is the very process [fol. 60] that we are talking about. Groups of this kind, having acquired some definite knowledge and information, could then, where the conditions suggested it, bring their findings before the Grand Jury for further investigation and action.

Good public officials will not resent inquiries by civic groups, but on the contrary they will take this interest as a sign of encouragement that help from the public is forthcoming to rectify the abuses which exist.

We trust that the Grand Jury will be convened at each term of court and that it will continue the work we have

started of investigating the official conduct of law enforcement officers and such other officers as the public interest may require, and further to take more drastic action than this Grand Jury has. Since perhaps a general public indifference is somewhat to blame for the conditions we found we feel that we have taken the first step. We trust that more drastic action will not be necessary.

We particularly urge the next Grand Jury to investigate promptly if there is any considerable re-opening of old gambling houses or the opening of new ones. We note some indications that the gambling racketeers are proceeding with expensive preparations apparently on the assumption that those in authority are favorably inclined. As we have said before the rackets cannot operate openly without official approval. The very existence of a Grand Jury investigation prompts great uneasiness. We have found that several big gamblers we wanted to question have been in hiding to dodge summons.

In the course of this presentment we have already made a number of comments and recommendations which we trust [fol. 61] will be constructive. We also make some recommendations as to changes in our State laws, and urge the three representatives and the State Senator to give these recommendations their hearty support. These recommendations follow:

Legislative Recommendations

1. The present law under which no Grand Jury is convened unless the presiding Circuit Judge calls for a Grand Jury should be changed so that a Grand Jury is convened automatically at the beginning of each term of the Circuit court.

Comment. A Grand Jury, by accepting its opportunities to do constructive work, can perform a badly needed service to the County. Besides returning indictments it can and should furnish as "the people" checking up on the people's business. The convening of a Grand Jury should be as fixed as the opening of a term of Court or the holding of public elections. The power to prevent or postpone the exercise of this vital function should not reside in any person, even a Circuit Judge. There is nothing revolutionary in this recommendation. It was the law in this State until recently.

2. That, in addition to the present 18 man Grand Jury, provisions be made by law for the selection of three additional alternate Grand Jurors, to serve in the absence of regular Grand Jurors, much as alternate jurors serve on trial juries.

Comment. In the course of a lengthy term of Court extending over months, such as the present one, we have found considerable difficulty obtaining the required quorum at times due to the illness or unavoidable absence from the City of a few members from time to time. More flexibility as to membership will greatly increase the Grand Jury's investigative efficiency.

[fol. 62] 3. That by statute the right of a prosecution to enter a nolle prosequi (dismissal) of a criminal case pending be restricted so as to require him to file among the official records a written motion to the Court, stating fully all the facts upon which he bases his conclusion that the case be dismissed, the Court by order to find the facts stated to be true and concurring as to the sufficiency of the reasons stated, before the dismissal becomes effective.

Comments. The dismissals entered by the County Solicitor prompted thought on this question. Regardless of who the prosecutor is, however, it shocks us to think that a prosecutor should have the arbitrary power to dismiss a prosecution without assigning any reason whatever.

4. That the Charter of the City of Miami be amended so as to make the office of Municipal Judge elective for a four year term so that this official can afford to devote his full time to the work, to be free from any political interference from the City Commissioners, or threat of interference, and to have the dignity of office which the importance of its function warrants. His salary should be on a par with the Criminal Court Judges.

Comment. We have stated the reasons for this recommendation in the body of this report.

5. That the legislative joker contained in the licensing statute of 1941, Chapter 20956, which had the effect of substantially repealing the 1937 statute outlawing slot machines, be repealed, leaving the 1937 law in full force and effect so that the mere possession of a slot machine is unlawful.

Comment. The 1937 Act outlawing slot machines was an [fol. 63] effective piece of legislation enacted in response to an overwhelming public demand. The slot machine racket somehow managed to slip into a general licensing law in 1941, a trick sentence, by which these slot machines, with the name*d* changed to amusement machines, were licensed. The Courts then held that since the machines were licensed by the State, the Legislature could not have intended them to be unlawful. So all the work of the 1937 law was undone except that the machines pay off over the counter instead of automatically. Under the 1937 law it was a simple matter to drive out these vicious devices. We urge the legislative representatives to give this recommendation their utmost efforts.

6. That the statute concerning injunctions against public nuisances (hous*ing* of gambling and of prostitution) be strengthened so as to

(a) Provide that proof of the maint*ai*nance of a gambling or prostitution house is prima facie evidence that other business being conducted on the same premises is related to the maintenance of the gambling or prostitution house and subjecting the entire premises to injunction unless those persons concerned with or interested in the conduct of the businesses claimed to be legitimate overcome this presumption by showing that they have no interest in the illegal operations nor had any knowledge, actual or constructive, that such illegal operations were being conducted in the same premises.

(b) Violations of the laws regarding regulations of the sale of intoxicants in premises licensed for the sale of liquors be defined as a public nuisance and made [fol. 64] subject to the injunction statute.

(c) That all costs and expenses incurred in obtaining an injunction as a public nuisance, including all costs of investigation and attorneys' fees, whether incurred by the State, County or individual citizen, be taxed as costs against the defendants and the property enjoined.

(d) That the statute specifically give the State the right to a prompt appeal to the Supreme Court from any order of the Lower Court denying application for temporary injunction.

Comment. This recommendation is made on the basis of facts presented by the State Attorney and examples of actual injunction filed by him against gambling houses. The laws generally are all in favor of the criminals. We agree with the State Attorney that more consideration should be given to the protection of Society. There are entirely too many loopholes.

It seems sensible to us that if a man, in defiant disregard of the laws, maintains a public nuisance, he should certainly be made to pay all the costs of closing him up and the State or County should not have to carry the load.

We recommend that constituting liquor law violations public nuisances primarily to suggest an additional legal weapon against liquor places that habitually contribute to juvenile delinquency by employing minors or by selling liquor to juveniles and similar violations, etc. When the law can effectively close such places, the possible financial loss should promote greater vigilance on the part of the proprietors of bars and night clubs.

[fol. 65] 7. That the function of the State Attorney and the County Solicitor be consolidated in one office.

Comment. We think it is ridiculous to have both a County Solicitor and a State Attorney. This divided authority makes for confusion and inefficiency. The saving in money which could be effected by consolidation while considerable is the least important reason for eliminating this condition. There should be only one prosecutor in the State Courts, with such number of assistants as the work requires.

8. That a local bill be passed at the next session of the Legislature to remove any doubt as to the constitutionality of present laws by which the State Attorney employs his own investigator and has a fund for investigation, which bill should not require specific approval by the County Commissioners but should make the funds available on requisitions of the State Attorney, the purpose of the expenditure to be made fully known to the Grand Jury which shall audit the State Attorney's expense fund each time it convenes.

Comment. We have seen some of the handicaps the State Attorney labors under. In order to function properly he should not only be equipped to investigate the capital cases which his office prosecutes but he should be equipped to conduct investigations so as to unearth facts which should

be presented to the Grand Jury in its inquisitorial function. The funds should be available to him when needed without the necessity of going to the County Commissioners in advance of each expenditure. Proper check of these expenditures can be provided by the Grand Jury who should be in a better position than any other body to understand the necessity or lack of necessity of such expenditures. So [fol. 66] far as the dangers of misappropriating these funds is concerned, we have learned enough about the gambling racket to appreciate the fact that if a State Attorney wished to be dishonest he would not have to embezzle public funds.

9. That the business of furnishing horse racing information by the "wire service" already referred to be made a felony. In the alternative that, as a monopoly, it be subject to state regulations as are telephone companies.

Comment. This is in addition to the non-legislative recommendations included in the body of this report.

Acknowledgments of Appreciation

The Grand Jury has, with extremely few exceptions, found the public officers, who were called as witnesses, cooperated with the Grand Jury and were frankly helpful in their testimony. We were par-iculaarly impressed with the candor of virtually all of the Miami police officers who testified. We were also impressed with the candor of some of the elective officials examined, but as a whole they did not measure up in this respect to the testimony of the police officers.

We thank the County Commissioners for their cooperation in providing funds for the data on the cases handled by the County Solicitor. We are sorry to have to present them with bills for reporting and transcribing the testimony takin before the Grand Jury Committee, but the results we feel amply justifies all expense. This expense would have been considerably greater than it is had not the State Attorney's secretaries handled a good portion of this work.

We express our appreciation to Judge Paul D. Barns for [fol. 67] his guidance and counsel in the proper performance of our duties and for his courtesy and consideration.

We also express our appreciation to the State Attorney and his assistants and staff for their wholehearted cooperation and industry in assisting this Grand Jury to obtain the

facts before us. The State Attorney was extremely interested in the objectives of our investigation, but never attempted to exceed his function as counsel for the Grand Jury.

Finally, we acknowledge our indebtedness to some of our members who did much of the tediour spade work of our investigation and in the drafting of this presentment. These members were J. P. Murray, R. J. Hanna, Oliver Babbitt, J. E. Bandy and Robert T. Jones.

The latter three who served as the Grand Jury's Committee to assemble most of the testimony had a peculiarly burdemsome task, and unselfishly devoted weeks of their time to this work. The community, as well as their fellow members of this Grand Jury, owe them a debt of gratitude.

Respectfully submitted, Dade County Grand Jury, Spring Term 1944, by William P. Baird, Foreman.

J. E. Bandy, Clerk.

Dated: November 13, 1944.

[fol. 68] EXHIBIT "A" TO RETURN OF RESPONDENTS

In re: JOHN D. PENNEKAMP and THE MIAMI HERALD PUBLISHING CO.

AFFIDAVIT OF JOHN D. PENNEKAMP

STATE OF FLORIDA,
County of Dade:

John D. Pennekamp, having been duly sworn, upon his oath deposes and says:

That he is now and has been since 1941 associate editor of The Miami Herald; that from 1937 to 1941 he was managing editor of The Miami Herald; that as associate editor he has immediate and complete charge of the newspaper's editorial policies; that during the period from 1937 to 1941 as managing editor he had immediate and complete charge of the newspaper's news policies; that he is now familiar with the newspaper's news policies.

One of the objects of The Miami Herald is to bring to its readers the news of the world, local, state, national

and international, each day. The object of The Miami Herald in respect of its editorial policy is to comment on matters of vital importance to the residents of Miami and Dade County in particular and Florida in general each day. News is factual information concerning matters of public importance that in the judgment of the editor is of sufficient general interest to warrant its publication in the ne-spaper. Editorial comment is discussion of such matters from the analytical or critical viewpoint including the expression of opinion.

It is the policy of The Miami Herald to present the [fol. 69] news factually, objectively, accurately and fairly without regard to the editorial policies of the newspaper.

It is the editorial policy of The Miami Herald to comment in forthright language upon matters of general importance, to express opinion on local, state, national and international matters independent of any pressure group or political party or faith, to condemn practices which deserve condemnation, to support proper reforms and particularly in local matters to support proposals for the improvement of government in Miami and Dade County so as to make Miami a fit place in which decent people may enjoy living. The Miami Herald has no affiliances, political or otherwise, no axes to grind, no favor to seek, none to give, and no selfish purpose to serve. It regards what is good for Miami is good for it.

The Miami Herald by reason of its ownership is known as a Knight newspaper. Many years ago, the late C. L. Knight, father of the present editor and publisher of The Miami Herald proclaimed an editorial credo, which has been adopted by his son, and which I regard as basic to a declaration of The Miami Herald's editorial policy:

"We are ourselves Free—Free as the Constitution we enjoy—Free to truth, good manners and good sense. We shall be for whatever measure is best adapted to defending the rights and liberties of the people and advancing useful knowledge. We shall labor at all times to inspire the people with a just and proper sense of their condition, to point out to them their true interest and rouse them to pursue it."

Over a period of years and more particularly since 1937, The Miami Herald has vigorously campaigned for proper

[fol. 70] law enforcement. It has taken leadership in efforts to eliminate from places of authority or responsibility, officials who in its opinion had ceased to deserve public trust. It took the leadership in the establishment of the city managership form of local government upon a real managerial basis. It has carried on vigorous campaigns to elect and to have named law enforcement officers who would enforce; to remove those who would not.

The Miami Herald has consistently brought to its readers the news of proceedings in the various courts of Miami and Dade County as well as the Supreme Court of the State of Florida, the Federal Courts and the Supreme Court of the United States. The Miami Herald has consistently and frequently expressed its opinion upon the decisions of these courts and the proceedings therein consistent with its policy of bringing to its readers the news of such proceedings and conveying to those readers its opinions thereon and all to the end that a better informed public opinion would aid and assist the administration of justice in our various courts. For many years it has been a generally accepted fact that criminal procedure in Florida is archaic; that under the laws of the State those charged with crime are enabled to avail themselves of delay and technicality so as to postpone and in many cases avoid the consequences of their acts. The Miami Herald has consistently advocated a reform in judicial procedure, the elimination of these archaic rules and technicalities in order that those charged with crime may have their day in court and that those charging them with crime may prosecute while witnesses are alive or before the facts may be forgotten. As an illustration of its interest in this matter [fol. 71] The Miami Herald published a large part of the recent report of the grand jury to the Circuit Court on law enforcement, particularly those comments of the grand jury on the breakdown of law enforcement against gambling.

Deponent further deposes and says that the editorials complained of in the citation issued on November 10, 1944 were written and published in accordance with The Miami Herald's well known, long standing and openly recognized policy of calling to the attention of its readers matters of public importance concerning which it thinks they should

be informed not only as to the facts but as to its opinion on those facts.

This affidavit is made for use in the above entitled case.

John D. Pennekamp.

Sworn to and subscribed before me this 27th day of November, A. D. 1944. Thelma Cain Warncke, Notary Public, State of Florida at Large. My Commission expires: 4-2-46. (Notary Public Seal.)

[fol. 72] EXHIBIT "B" TO RETURN OF RESPONDENTS

In Re: JOHN D. PENNEKAMP and THE MIAMI HERALD PUBLISHING CO.

AFFIDAVIT OF JEANNE BELLAMY BILLS

STATE OF FLORIDA,
County of Dade, ss.:

Jeanne Bellamy Bills, having been duly sworn, upon her oath deposes and says:

That she is and for a period of approximately seven years, has been a reporter on the news staff of The Miami Herald; that during that period of time she has covered many stories at the courthouse; that as a part of her employment as a reporter on the staff of The Miami Herald she has followed the proceedings instituted in this Court against the Brook Club and its owners and is familiar with the developments in those proceedings; that she has also checked the records of the court in respect of the rape cases mentioned in the citation directed to John D. Pennekamp and The Miami Herald Publishing Company under date of November 10, 1944; that she has also checked the records of the Court in respect of the proceedings in the so-called Teepee Club case mentioned in said citation. During the entire period of her employment by The Miami Herald it has been the policy of The Miami Herald to cover all such matters objectively, factually, and fairly from a news viewpoint, to obtain the background of such cases and to present all facts to the readers of The Miami Herald in order that those readers may be fully informed upon matters of general public importance.

[fol. 73] In co-operation with C. G. Berning of The Miami Herald staff she obtained a copy of the report of the grand jury to the judges of the Circuit Court of the eleventh judicial circuit of Florida in and for the County of Dade, handed to those judges on or about November 13, 1944, in which report the grand jury made a specific report on its gambling investigations in Dade County, Florida, wherein the grand jury itself said:

> "The general purpose of the report is to indict a system of law enforcement of the gambling laws, called the liberal policy. We have tried to show what this policy is, and its consequences. We have made several concrete recommendations, but fundamentally what we are driving at is to make the situation clear in the hope that an informed public opinion, which is the only possible basis for good government, will exert the pressure necessary to bring lasting improvement."

That as a part of its services to its readers the Miami Herald published stories at great length telling what the grand jury said in that report. These stories occupied many columns of space in The Miami Herald of November 14, 1944.

Deponent says that she examined, as part of her work as a reporter, the records of the former case (referred to in the Brook Club pleadings in Case No. 84054) against the Brook Club, in which the State, on the relation of George Couper Gibbs, then Attorney General, T. J. Ellis and L. [fol. 74] A. Truett, Assistant Attorneys General, G. A. Worley, State Attorney, Joseph A. Otto, Assistant State Attorney, and Robert R. Taylor, County Solicitor, filed a bill of complaint, being case No. 61247 to abate an operation of a gambling house known as the Brook Club. This case was positively identical as to defendants, place involved and location of nuisance, as in the recent case No. 84054 and both were filed in the Circuit Court of Dade County. To the bill in the earlier case were attached affidavits of two FBI agents supporting the allegations of the bill and stating that the information was furnished to the Attorney General of Florida upon the request to the FBI Director. Upon the date fixed for the State's application for temporary injunction in Case No. 61247, February 27, 1940, the defendants' counsel (one of whom, Vin-

cent C. Giblin, also represented said defendants in the subsequent Brook Club case) filed an answer under oath wherein among other things defendants said:

"This defendant, answering the allegations of paragraph 3 of the said bill, admits that during a part of the current winter season prior to the institution of this suit certain lessees and tenants of this defendant occupied and used a certain portion of the said building for the purpose of conducting and operating therein unlawful games of chance and that in such portions of such building gambling implements, de- [fol. 75] vices and apparatus were installed and used for illegal gaming purposes by such lessees and tenants. This defendant cannot truthfully disclaim or deny knowledge by it of the facts herein admitted. On the contrary, this defendant, believing that, because of the apathy or sympathy of the local community in which its club is situated and of Dade County generally, that statutes prohibiting gaming would not be strictly enforced by officers of the law, encouraged and co-operated with the operators of the gambling room in the said building. This defendant especially believed that a place, located at its club is and conducted on the high plane that such club has been conducted, would not be molested by law enforcement officers even if it should be generally known that unlawful games of chance should be permitted and encouraged in such place. This defendant's club is not in a populous neighborhood. No private person has made complaint of any injury sustained or likely to be sustained by himself or his property by reason of this defendant's permitting gambling on its premises. No criminal proceedings had been instituted, prior to the filing of the bill of complaint herein, against [fol. 76] anyone who has conducted or participated in games of chance in this defendant's club. This defendant, in the operation of its business, adopted and has employed the "club" plan for the purpose of enabling it to exclude from its restaurant and bar and its other facilities undesirable and objectionable persons; and, as a result of the adoption and use of such plan, its patrons and guests have been and are only persons of good repute. This defendant believed, at

the time it consented to and encouraged the use of a portion of its premises for gaming purposes, that it was supplying the demand of a large majority of the inhabitants of the community for well conducted and regulated gambling restricted to persons who could afford and wished, as a pleasurable diversion in the nation's winter playground, to engage in the playing of roulette and other games of chance. This defendant, however, became thoroughly convinced, prior to the institution of this suit, that the Sheriff of Dade County, Florida, and his deputies would no longer tolerate or permit illegal gaming on this defendant's premises or elsewhere in Dade County. This De- [fol. 77] fendant immediately caused its lessees and tenants to discontinue and abandon their gambling operations. Prior to the institution of this suit this defendant had voluntarily and in good faith permanently abated the nuisance of which the relators complain in the bill of complaint filed herein. The cessation of the unlawful practices which it had theretofore permitted is not a mere temporary cessation. This defendant does not intend to and will not permit a revival or renewal of such practices. The voluntary abatement by it of the nuisance complained of herein is bona fide and permanent."

On this same date, February 27, 1940, Judge Paul D. Barns entered an order, reciting the gist of defendants' answer, denying the temporary injunction, staying the proceedings indefinitely with right of the State to renew its applications for injunctions if the defendants resumed operation of the nuisance complained of. No further proceedings were had in this case until April 28, 1941 when Tom Watson, who had succeeded George Couper Gibbs as Attorney General, moved to withdraw the name of the Attorney General as a relator, stating that he believed the Attorney General should keep himself "free from interference in matters pertaining to local, county and city government where the local officials exist for the carrying on and execution thereof and have not been shown to have [fol. 78] failed in the performance of their duties." In addition to withdrawing as a relator, J. Tom Watson, as Attorney General, suggested the "court should make such further order in disposition of the case as to it may seem

appropriate and proper." No motion was filed by the other relators, including the State Attorney and the County Solicitor to withdraw their names as relators from the bill of complaint. On May 12, 1941, Judge Paul D. Barns entered an order reciting that the motion of Mr. Watson Attorney General, requested "permission of the Court to withdraw the State of Florida and the Attorney General as plaintiffs, at which hearing Hon. George A. Worley was present" and relating further that "in litigation it is necessary to have a plaintiff and defendant, and the plaintiff not desiring to proceed further and having withdrawn" ordered that the motion be granted and the cause dismissed.

On March 22, 1944 the second Brook Club case commenced with the filing of a bill of complaint, Chancery Case No. 84054 A. This case was entitled State ex rel. Stanley Milledge v. Brook Club, Inc., Harry McLeod and William Maher, as operators of Brook Club. The bill of complaint was for an injunction to abate a nuisance, for operating a gambling house. Under the blind filing system established by the Circuit Court rules this case fell into the division "A" Paul D. Barns, judge. Later it was heard by Judge George E. Holt, who granted a temporary injunction after hearing witnesses and it was finally disposed of when Judge Marshall C. Wiseheart signed the final decree dismissing the bill of complaint on October 31, 1944.

In the bill of complaint in the second Brook Club case [fol. 79] State Attorney Milledge alleged that the promises of the defendants made in the first Brook Club Case No. 61247 about stopping gambling were "utterly worthless and unreliable * * * and show that the said defendants have a disregard for the courts of this State as well as for the law enforcement officials of Dade County."

The defendants filed a motion to dismiss the bill on the ground that no necessity for injunction could exist unless law enforcement officials had failed in their duty, which upon being denied by Judge Holt, was appealed to the Supreme Court, Judge Holt staying the proceedings to give the defendants time to do this. Various postponements were had and it was April 20, 1944 when the State Attorney presented witnesses before Judge Holt in the presence of defendant's counsel, upon which evidence Judge Holt entered a temporary injunction on April 25, 1944, reciting

that "having considered the evidence submitted by the plaintiff, none having been offered by the defendants hereinafter named". The original notice of the State called for a hearing on March 28, 1944.

On May 1, 1944, the defendants filed their answer admitting the operating of a gambling room at the Brook Club on two widely separated dates," one of which was March 18, 1944. They denies that the Brook Club constituted a public nuisance.

On August 14, 1944, the defendants filed a motion for final decree on the pleadings and on October 24th, served notice on the State Attorney of a hearing on the motion before Judge Wiseheart on October 31, 1944.

[fol. 80] On October 31, 1944, Judge Wiseheart entered a final decree dismissing the bill of complaint.

Further, upon her oath, deponent says that she investigated the history of the rape cases mentioned in the citation issued under date of November 10, 1944. These were cases Nos. 847, 850, 855 and 856, in which five cases eight defendants were named. In each case an indictment was returned by the grand jury on October 21, 1944. The minutes of the Circuit Court show that at a session of that Court held at 2:00 P. M. October 30, 1944, Judge Paul D. Barns presiding, counsel for defendants in No. 856 presented a motion to quash the indictment, which was granted by the Court. The Court then ordered the above case "passed for resetting" and further ordered the defendants remanded to the custody of the sheriff. The Court minutes of October 30, 1944, also show that the Court ordered the indictments quashed as to the defendants in Nos. 847, 850, 851 and 855. The Court minutes for October 31, 1944, show that the grand jury entered at 2:00 P. M. with indictments for one Delmer Butler and for the identical defendants indicted on October 21, 1944, in the five rape cases wherein the indictments were quashed on October 30, 1944.

Deponent further upon her oath deposes and says that she has studied the record of the Teepee Club case, Chancery No. 87365 E, entitled State ex rel Stanley Milledge as State Attorney vs. Joseph W. Lipop and Oscar H. Morris as owners of the real estate of 5722 Southwest 8th Street, Miami, Florida, the Teepee Club. The action was

in the nature of a bill of injunction to abate a nuisance [fol. 81] for operating a gambling house (bookmaking). Under the blind filing system established by the Circuit Court rules this suit fell into Division "E" Judge Marshall C. Wiseheart; that the bill of complaint was filed on September 23, 1944; that notice of hearing on September 29, 1944 before Judge George E. Holt was issued; that the sheriff's return showed Lipop was served but Morris unserved; that on September 25, 1944, State Attorney Milledge mailed the defendant's notice of hearing for October 2, 1944 before Judge Holt on request for a temporary injunction; that on October 9, 1944 the defendant Lipop filed a statement that Morris was inducted into the Army on May 10, 1942, and that he, Lipop, denied all charges on behalf of Morris, which statement was filed by attorneys for Lipop; that on October 11, 1944 State Attorney Milledge filed transcripts of statements under oath and pursuant to subpoena taken in his office on September 21, 1944 of six men who were in the place when deputy sheriffs Burke and Hughes entered on September 18, 1944 and took the names and addresses of nineteen persons then there. State Attorney Milledge filed a certificate with each statement that the witnesses had been subpoenaed and sworn by him. At said hearing the State Attorney offered the statements under oath. (All but one statement was signed by the witnesses.) The attorneys for defendants filed motions to dismiss the bill and suppress the testimony obtained through the actions of deputy sheriffs Burke and Hughes, alleging that Burke obtained admittance improperly and without a valid search warrant, that the evidence was obtained by illegal search and seizure; that on October 10, 1944 Judge Holt signed an order accompanied by an opin- [fol. 82] ion denying the application for a temporary injunction and in his opinion he stated that the five affidavits introduced by the State Attorney over defense objections "go more into detail than the 'live' witnesses before the Court but can not be considered"; that on October 11, 1944 State Attorney Milledge filed a motion to set aside the motion denying the temporary injunction and renewing his motion for a temporary injunction in which motion he cited a statutory authorization for use of affidavits to support the issuance of a temporary injunction pending final hear-

ing; that on October 12, 1944, Judge Holt denied the motion for rehearing.

This affidavit is made for use in the above entitled cause.

Jeanne Bellamy Bills.

Sworn to and subscribed before me this 27th day of November, A. D. 1944. Thelma Cain Warncke, Notary Public, State of Florida at Large. My Commission expires: 4-2-46. (Notary Public Seal.)

[fol. 83] In the Circuit Court in and for Dade County

Excerpts from Transcript of Testimony—Filed December 6, 1944

Colloquy Between Court and Counsel

Judge Barns: Gentlemen, before this matter gets under way, we wish to make a statement for your consideration. The respondents here have been brought to answer a charge that they made an unfair statement concerning the proceedings in court, and in turn have based criticism upon an unfair, untrue statement. It was considered not a full report, nor a fair report. You have been cited here by Judges Wisehcart and Barns. We believe in the freedom of the press; we believe in freedom of speech, and we believe in the writ of habeas corpus. We know of nothing in our Constitution that is more important to be preserved than those things—those three things—and we believe in a fair trial. It may be that the respondents here are of the opinion and believe that they would receive a better trial, a more fair trial, from some other judge than Judges Wiseheart and Barns, and under those circumstances we are ready to retire and assign the case to another judge. We have available three other judges, any one of whom I think would give you a fair trial. We would like to have you express your wishes in the matter. Whatever you do will be fully understood and we can well understand that you might think that you would get a better trial from some other judges.

Mr. Milam: May your Honors please, the respondents are cited here, as the Court has indicated, on a most grievous and serious charge.

[fol. 84] Judge Barns: Yes.

Mr. Milam: We are here to respond to that charge and to show why these respondents are not in contempt of court. We have no suggestion whatever to make as to the constitution of the court and as to who shall sit upon the trial of this case—none at all.

Judge Barns: Yes. Do I understand you, Mr. Milam, to say that your issue is that you made the publication, but it was not an offense?

Mr. Milam: Yes, we made the publication of these two editorials.

Judge Barns: And it was not an offense?

Mr. Milam: Our answer will trace that out entirely.

Judge Barns: Yes. Under the circumstances, you feeling as you do, we will proceed with the trial, and we appreciate the attitude that you have concerning the matter. It is quite a compliment to us; we feel that you consider that you will get a fair trial and we will do our best to see that your faith is not in vain.

* * * * * * *

Judge Barns: Mr. Hanson, if you don't mind, I would like to ask you a question or two.

Mr. Hanson: Yes, sir.

Judge Barns: The Court has been very much impressed with your argument, and we know that you have given the matter a great deal of thought and consideration, but with the giving of the press the freedom that you have, you have not mentioned how much of a restraint should be put on that press with its freedom. What would be the—first, I [fol. 85] don't want you to assume that this applies to your client in answering my question, but just thinking about it academically, what do you think would be the limit of the libel of the Court concerning court actions? I am not thinking about the right of the Judge to sue for damages; I am inquiring about what do you think——

Mr. Hanson: Whether the court could sue?

Judge Barns: No, no. What do you think would be the remedy? It is for you to answer, and not me, if you have an answer; I don't know.

Mr. Hanson: The answer, sir, is that from Chief Justice Hughes comment in the Near vs. Minnesota case, where he said that these forms of restraint such as injunctions, suppressing publication, or punishment of constructive contempt—we will write this into his opinion, but I mean as

applied overall—were in effect restraints on the expression of opinion and dissemination of information; that the proper rule is the rule of subsequent punishment. Now, that was extended also by Mr. Justice Douglas in the Nye case, where he said that you can not effect a restraint through a contempt proceeding, but that if it is an illegal act, then it should be punished as an illegal act. Now, I am frank to say that under the libel laws of the country, newspapers have been sued by judges in their individual capacity.

Judge Barns: I am not concerned with him; I am concerned with the Court.

Mr. Hanson: That is all. I am concerned with in this. What the Supreme Court has said—and I answered that because, as referred to by my brother Carson, you are asking the question now—is that the common law on the con- [fol. 86] tempt power did not pass to the judges of the United States, and they said that in the Times-Mirror case.

Now, maybe we are left without a remedy, if a remedy be needed by the courts in these cases of constructive contempt, which over a period of 150 years they have construed as being within their power, because under the latest doctrine of the Supreme Court, as I see it, if a judge is annoyed by, or feels that he is injured by, or that his court is injured by comment, he can not do anything about it unless the danger to the fair and impartial administration of justice by him or by his court is extremely close to him, in the courtroom, or manifested with such a high degree of imminence as to express a high degree of threat.

Now, I can give you some instances of that. This morning—and I think the photographer obtained the permission of the Court—pictures were taken in the courtroom. Well, it is an absolute rule under the clear and present danger theory, and it is now the clear and present danger rule that no photographer, no person, can do anything in the courtroom of that nature that interferes with the proceedings either before the court sits down, when the court is there—the judge comes in in that hall—until he has departed, without his consent, or in his courtroom during his absence, without his consent, of that nature. Now, we had a court case of that kind in Ardmore, in my home State, where a very notorious murderer was being tried. There had been an instance in some court somewhere, which Judge Edone(?) notes, there had been a flashlight picture, and

[fol. 87] the prisoner tried to escape, so he ordered no pictures taken there. The photographer on a Baltimore paper went in with a candid camera, which was not visible to the court or any attendants of the Court, and he took pictures, and was fine- $5,000, and the one responsible for sending the photographer in was fined, and I think a jail sentence.

Now, that is contempt under the clear and present danger theory.

Now, if the Miami Herald would say anything about this Court, or if anybody would say anything about the Court, and then put its boys down here to hawk that criticism in the presence of the court, so that these people who are coming in and out of the court and doing business with the court, where they would be affected, I would think that would be contemptuous; but I do say, just as you are free to say anything you want about the Miami Herald, and that the Miami Herald has to take it unless they want to sue you for libel in its individual capacity, that under this doctrine a newspaper can go to the extreme of saying what it wants to say about judicial proceedings, and I regret to say that when it is given that right, it is also given the right of being unfair if it wants to be, but I don't know of any newspaper that wants to be unfair.

Judge Barns: You say it has the right to lie about it?

Mr. Hanson: Yes; and if it lies about the court, the individual judge who is lied about has the right of suing for libel.

Judge Barns: That is the Judge's right.

Mr. Hanson: That the newspaper has or that the editor of the newspaper has to sue him for libel. But I mean [fol. 88] that is the extreme of that, because, as was said by the Chief Justice in the Near case, and has been repeated, there are so few instances of these wrongful acts on the part of newspapers that it is better to preserve the general overall right than it is to try to cure the isolated evils by destroying the freedom of the press.

Judge Barns: You mean it has a right to lie about the court unless the lie is published under such circumstances as to present a clear and present danger of interfering with the machinery of the Court?

Mr. Hanson: Let us say it has a right to lie, or has the right to tell the truth, and it does not make any difference whether it is a lie or the truth, if it interferes—presents a clear and present danger.

Judge Barns: Even to tell the truth?

Mr. Hanson: Even to tell the truth.

Judge Barns: At times.

Mr. Hanson: If it is told in such a way as to present a clear and present danger to the administration of justice would subject it to the penalty of justice, just as much as tell an untruth.

Judge Barns: Do you contend that the freedom of the press carries with it the right to lie?

Mr. Hanson: The courts have so held, and they could hold no other thing if you can have the freedom of speech and freedom of press; it does carry the right to lie, and then the courts have said the one who is lied about has his remedy in some form of subsequent punishment rather than through some form of restraint.

[fol. 89] Judge Barns: But that is the individual right that you are talking about.

Mr. Hanson: That is the individual right that I am talking about, and it has also been held to be the right in the case recently upheld by the Court of Appeals in New York in the case of a labor union.

Judge Barns: But speaking of the court as an institution, you have a right to lie about it without there being any punishment, wouldn't you, under that?

Mr. Hanson: Just the same as you have the right to tell the truth about it without any punishment, if the truth hurt.

Judge Barns: Well, the truth, as a rule, does not hurt.

Mr. Hanson: It hurt Judge Manton in New York, when the Scripps-Howard put him in the penitentiary. It hurt Judge English out in Illinois. He retired from the bench to escape conviction.

Judge Barns: Of course there the truth ought to have been told, but no one's mouth is closed to tell the truth about a court.

Mr. Hanson: And there is no legal definition, your Honor, as to what is the truth. Even the legislatures have seldom defined "truth."

Judge Barns: But the people know.

Mr. Hanson: That is right.

Judge Barns: As a rule the closing of the mouths of the press to tell the truth is only when it was frustrated in carrying out the court's writ, is it not?

Mr. Hanson: What is that?

Judge Barns: As a rule the mouth of the press is never [fol. 90] closed to tell the truth except when if they tell the truth it would frustrate or affect the rights of some individual litigant.

Mr. Hanson: Oh, no. Now, your Honor, you are dealing with contempt. Now we have a voluntary censorship where the press is closed on matters pertaining to national defense that might give some help to the enemy.

Judge Barns: We are talking about the truth concerning courts.

Mr. Hanson: Let us talk about expressions concerning courts, because the truth is a matter of viewpoint. The Herald may think that what it said about a proceeding in this court was factual from the records it got, and the comment was fair; and the courts, from its knowledge, may take exactly the opposite view. So that is a matter of viewpoint, but in the long run truth in such matters is what the public believes in the light of the information that it gets from both sides.

Judge Barns: Both sides?

Mr. Hanson: Yes. And this court has issued a citation, and that fact has been published, and these proceedings will be published, and the public will get the information concerning these proceedings, and whatever the judgment of this Court may be, the public will be informed as to the judgment, as to the reasons for it, and if the judgment be against the Herald and the matter is appealed, the public will continue to be informed until the court of last resort determines the issue, and whatever the determination is the public will be informed, and then eventually the public will make up its mind as to what the truth is.

[fol. 91] Judge Barnes: That is right, naturally, I am going to ask you another question. You have said here in this case that you were in the Los Angeles case. How long did it take to try the Los Angeles case?

Mr. Hanson: The Los Angeles case did not take long.

Judge Barns: How long?

Mr. Hanson: I think—I was not in Los Angeles at the time of the actual trial, but I think it was less than two days.

Judge Barns: And did they review the record of that in two days?

Mr. Hanson: Oh, now, wait a minute. They did not review the record of the paper in two days. The Bar Association of Los Angeles named a committee which got the files of the Los Angeles Times. They took the files for six months; the committee studied every editorial printed in the Los Angeles Times for a period of six months; it selected five editorials and it presented those editorials to the court, with an affidavit by J. Louis ——, Secretary of the Committee, stating to the committee that these editorials were contemptuous. The citation was issued. The Los Angeles Times moved to dismiss, supported the motion by affidavit. There was a brief hearing on the motion; it was denied. They went into the hearing, and they had witnesses in which they had, as I recall, the two Chandlers and Mr. Hodgkiss, as to why the editorials were written, all from their record.

Judge Barns: And you were there?

Mr. Hanson: I was at the argument in the Supreme Court of the United States, and I filed briefs in it all the way through in Los Angeles, but was not in the Superior Court of Los Angeles or in the Supreme Court of California.

[fol. 92] Judge Barns: Not in the court where it was tried?

Mr. Hanson: No, sir.

Judge Barns: Thank you very much.

Mr. Milam: Are the friends of the court finished?

Judge Barns: Are you finished?

Mr. Carson: I had one or two remarks.

Judge Barns: Now?

Mr. Carson: Yes—anytime.

Judge Barns: You better make them now.

Mr. Carson: I merely want to say that the issue is—that if the freedom of the press includes the right to lie about the courts, then I think I shall have to apologize.

Mr. Milam: If your Honor please, I want to bring the case back to what seems to me to be the issue. I have made considerable notes, but I think that it is unnecessary, in view of the court's recent discussion. The facts in these several cases involved here have been brought out at great length, and I will not labor the Court further with them. I don't very much like—if it makes any difference—I do, however, say I don't think the imputation is fair that there has been any lying in this case.

Judge Barns: Did you understand my question in the beginning? I prefaced it with the remark that the answer would not have any reference to these respondents.

Mr. Milam: I concede that, but I want to get it on a little different note before you close here.

Judge Barns: Yes.

Mr. Milam: The record in the Teepee case and the Brook Club case is now before the Court, of which it will take judicial notice, but it justified a far stronger editorial, [fol. 93] I submit, than was published here. The editorial mentioned three cases, but dealt in generalities. The petition for rehearing in the Teepee case had many grounds that could have been stressed. The newspaper gave what it considered to be a fair and impartial account.

Now, talking of a suggestion, there was no suggestion that there was any intentional departure from the truth. If there were, it had been denied specifically in the response herein.

Judge Barns: I beg your pardon. Read that statement, please.

Mr. Milam: I will repeat it, sir, if I may. There was no intent in this case to wilfully misrepresent any fact, or, as Mr. Mershon said, to falsely quote the records of this Court. We submit that there was no such thing. We submit that the actual records of the court could have justified even stronger statements than were made here.

Now I want to bring it back to the whole issue that was made, and that seems to so strongly impress the Court. This citation was drawn upon the reasonable tendency rule; it tends to obstruct justice; it tends to go forth. We were not charged with creating a clear and present evil and a subsequent evil, and a gri-veous one, the imminence of which was very high. I respectfully submit to the Court that that is the true rule.

Something has been mentioned about the common law, but the fifth headnote in the Los Angeles Times case says: (Reads headnote.) That should foreclose any question about that. We get back then to the clear and present danger. I ask your Honors, both of you sitting on the bench, would the comment that was made in this editorial about rape cases and their re-indictment in the slightest degree [fol. 94] prejudice either of your Honors or obstruct you in giving fair trials to the defendants in those cases?

Let me propound the further question: Did the comment on the Book Club case, which *which* has been completely finished and dismissed and is a past matter, could it create in the minds of either of the judges sitting here a clear and present danager of a substantive evil that would be imposed against the defendant?

Let me get to the Teepee Club case. Could what was said about striking affidavits for use upon application for temporary injunction create a clear and present danger, and that imminence was great of that grievous danger that this court could not fairly decide upon the permanent injunction, which is the only issue involved in the case.

Frankly, I don't ever want Circuit Courts of this State, nor the judges, we will say, lacking in the firmness, resolution and character, but impervious to flattery, criticism or anything else which could in the slightest degree create any present or clear danger, and we submit it on that.

Judge Barns: Mr. Milam, may I ask you a question?

Mr. Milam: Yes, indeed.

Judge Barns: Would that not then resolve itself into a question of whether or not the act of the paper, measuring the act of the paper as against the strength of character and stability of the judge—of the particular judge involved?

Mr. Milam: Not at all; not at all. If your Honor please, the protection of the court rests in its actions over a long time, and its fair decisions, and nothing in the world can wreck a newspaper so fast as unfair and unauthorized and [fol. 95] unwarranted criticism of the courts. The public will take care of that. It does not create, if I understand your question——

Judge Barns: I am afraid I have not made myself clear. If the clear and present danger rule is to be applied, as you suggest, would it not be then to measure the act of the paper as against the strength of character or stability of the judge discussed? In other words, are we to hold—a strong judge can yield more than a thin-skinned judge, and you would never know whether the danger was clear and present until you first found out about the stability of the judge involved.

Mr. Milam: As an officer of this Court I will answer that I don't think any judge of this Court is lacking in fortitude and character as mentioned by the Supreme Court.

Judge Barns: Is that to be the test of the paper's act? Even assuming—for the purpose of illustration, is our character to be the test of whether or not your client is in contempt?

Mr. Milam: Not at all. As said in the Earman case, we must assume that the judges are of reasonable firmness of character, fortitude and resolution. The Herald refused to state that the judges of the Circuit Court here or elsewhere in the State lacked any of them.

Judge Barns: Allright. Thank you very much.

* * * * * * * *

[fol. 96] Reporter's Certificate to foregoing tranciript omitted in printing.

[fols. 97-98] DEFENDANT'S EXHIBIT "A"

TRANSCRIPT OF RECORD FROM THE CIRCUIT COURT IN AND FOR THE COUNTY OF DADE, STATE OF FLORIDA IN CASE OF STATE OF FLORIDA, EX REL. STANLEY MILLEDGE, AS STATE ATTORNEY FOR THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, PLAINTIFF, V. JOSEPH W. LIPOP AND OSCAR H. MORRIS, DEFENDANTS.

Nov. 28, 1944.

E. B. Leatherman, Clerk of the Circuit Court.

CHANCERY No. 87265-E

STATE OF FLORIDA, ex rel.: STANLEY MILLEDGE, as State Attorney for the Eleventh Judicial Circuit of Florida, Plaintiff,

vs.

JOSEPH W. LIPOP and OSCAR H. MORRIS, Defendants

[fol. 99] On September 23rd, A. D. 1944 Bill of Complaint was filed in the words and figures, to wit:

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

No. 87365 E

STATE OF FLORIDA, ex rel.: STANLEY MILLEDGE, as State Attorney for the Eleventh Judicial Circuit of Florida, Plaintiff,

vs.

JOSEPH W. LIPOP and OSCAR H. MORRIS, Defendants

INJUNCTION TO ABATE NUISANCE

The State of Florida, by Stanley Milledge, State Attorney in and for the Eleventh Judicial Circuit of Florida, as Relator, brings this bill of complaint against Joseph W. Lipop and Oscar H. Morris, both residents of Dade County, Florida, and thereupon complaining said Relator informs the Court and alleges as follows:

1

That the defendants keep and maintain, and for some time past have kept and maintained, in Dade County, Florida, a well known public nuisance, as defined in Section 823.05, Florida Statutes 1941, and in violation thereof, known as the "Teepee Club", which consists of a building on the land hereinafter described in which is maintained divers equipment and apparatus for engaging in unlawful games of chance, and where various unlawful games of chance are [fol. 100] engaged in for money in violation of the laws of Florida, and taking of wages upon the results of horse races.

2

Said building is situated upon land in Dade County, Florida, known as "5722 S. W. 8th Street", more particularly described as follows:

"North 100′ of West 100′ of East 200′, of Tract 1, Sylvania Heights, according to the corrected Plat of the revised and amended Plat by Sylvania Heights, recorded in Plat Book 28, at page 62, Public Records of Dade County, Florida."

Said building, which has only the ground floor, contains a bar, a dining room, kitchen, lavatories, and on the South side of the dining room a room constructed for the purpose of maintaining a gambling room, and used for that purpose; betting and wagering on the results of horse races is conducted; that there are employees to sell tickets to patrons on horses of their selection about to run in races at race tracks outside of Florida, other employees to cash the winning tickets according to the results of horse races as they are announced over a loud speaker in said premises and are posted on the wall by an employee. The said establishment is a known gambling house, and is patronized by persons who live in various sections of Dade County, Florida; that recently, to-wit, on September 18, 1944, there were [fol. 101] many persons, to-wit, 25 to 30, many if not all of whom are engaged in wagering on horses in said building.

4

The said premises are open to the public and are frequented by members of the public, although an employee is kept posted at the door to the said gambling room, but this device is not employed as a restraint upon the members of the public who wish to enter the gambling room in said building.

5

According to the public records of Dade County, Florida, the defendants, Joseph W. Lipop and Oscar H. Morris, are the record owners of the above described real estate, and all of said premises is occupied and controlled by said defendants with the exception of that portion of the building on the West and thereof, separated by a wall or petition and occupied as a beauty salon known as the "Teepee Beauty Salon", located at 5728 S. W. 8th Street, and as a barber shop known as the "Teepee Barber Shop", located at 5726 S. W. 8th Street, and as to this portion of the building no injunction is sought. The business of the defendants, owned, operated and controlled by them, consists of the operation of a bar, the selling of good-, and the operation of a gambling room; that all portions of said business are interrelated and is so operated as to constitute a public nuisance as defined by law.

6

Unless restrained the said defendants will continue to operate and conduct the said premises in the manner aforesaid in open disregard, violation and defiance of the laws of [fol. 102] Florida in wilful contempt and disregard of and to the injury and corruption of the public morals and decency of Dade County and the State of Florida, and will continue to maintain a public nuisance as hereinabove described.

7

Wherefore, it is respectfully prayed on behalf of the State of Florida that the Court temporarily restrain and enjoin the defendants, their agents, servants, and employees from conducting, maintaining or operating or from permitting to be maintained, conducted or operated each and every of said unlawful games of chance or any unlawful games of chance on said premises, and from maintaining on or near the same any equipment or apparatus designed and intended for use in unlawful gambling; that the defendants until further order of this Court be enjoined from using or permitting said premises to be used for any purpose whatsoever, and that upon final hearing said injunction be made permanent and perpetual, and that the defendants be required to pay the costs of this suit, and that a lien therefor be decreed in favor of the State upon the property and fixtures in said premises or upon said real estate and building.

Stanley Milledge, as State Attorney in and for the Eleventh Judicial Circuit of Florida.

On September 25, A. D. 1944 Notice of Hearing on Application for Temporary Restraining Order was filed in words and figures as follows, to-wit:

[Caption omitted]

[fol. 103] NOTICE OF HEARING ON APPLICATION FOR TEMPORARY RESTRAINING ORDER

To: Joseph W. Lipop, 825 Almeria Avenue, Coral Gables, Florida, and 5722 S. W. 8th Street, Miami, Florida. Oscar H. Morris, 5722 S. W. 8th Street, Miami, Florida:

You Are Hereby Notified that the Relator in the above styled cause will apply to the Honorable George E. Holt,

one of the Judges of the above styled Court, for a temporary restraining order on Monday, October 2, 1944, at 11:00 o'clock A. M. in the chambers of Judge Holt in the Dade County Court House.

Dated at Miami, Florida, this 25th day of September, A. D., 1944.

Stanley Milledge, as State Attorney in and for the Eleventh Judicial Circuit of Florida.

AFFIDAVIT OF MAILING

STATE OF FLORIDA,
County of Dade, ss:

On this day personally appeared before me, the undersigned authority, Billie Gillespie, who being first duly sworn says that she is employed in the office of Stanley Milledge, State Attorney for the Eleventh Judicial Circuit of Florida; that on September 25, 1944, she served a true copy of the above and foregoing Notice on each of the above defendants by placing same in envelopes addressed to said persons at their respective addresses shown above; that she placed on said envelopes sufficient uncanceled United States postage to carry same to their destination, and placed same [fol. 104] in the United States mail at the main Post Office, Miami, Florida, prior to 5:00 o'clock P. M. on said date.

Billie Gillespie.

Subscribed and sworn to before me this 25th day of September, A. D. 1944, Rhona Mixon. My commission expires: 4-4-48. (N. P. Seal.)

On September 29th, A. D. 1944 Summons was filed in the words and figures as follows, to-wit:

[Caption omitted]

SUMMONS IN CHANCERY

The State of Florida to Joseph W. Lipop, 825 Almeria Ave., Coral Gables, Florida, and 5722 S. W. 8th Street, Miami, Florida, and Oscar H. Morris, 5722 S. W. 8th Street, Miami, Florida.

You are hereby notified that a suit has been brought against you in the Circuit Court for Dade County, Florida, in Chancery, by the State of Florida, Ex Rel., Stanley Milledge, State Attorney, and you are hereby required to file your answer or motion to dismiss said bill of complaint within twenty (20) days after service of this summons upon you.

[fol. 105] Herein fail not or judgment will be entered against you by default.

You are further notified that the plaintiff in said cause, through its Relator, will apply to the Honorable George E. Holt, one of the Judges of said Court, for a temporary restraining order pursuant to the prayer of said bill on Friday, September 29, 1944, at 9:30 A. M. at the chambers of said Judge in Dade County Court House, Miami, Florida, or as soon thereafter as the said application can be heard.

Witness my hand and seal of said Court, at Miami, Dade County, Florida, this 23rd day of September, A. D. 1944.

E. B. Leatherman as Clerk of Said Circuit Court, by Wm. W. Stocking, Deputy Clerk. (Circuit Court Seal.)

Filed Sheriff's Office 1944 SE 23 AM 11 20 Dade County, Florida.

(The following Endorsement appears on the reverse side of Summons)

Served Lipop 9/23/44 16 m
No on Morris in U. S. Army 2 years

2 60
2 00

4 60

J. T. Vann

[fol. 106] On October 9, 1944 Suggestion of Military Service of Oscar H. Morris, Defendant, was filed in the words and figures as follows, to wit:

[Caption omitted]

SUGGESTION OF MILITARY SERVICE OF OSCAR H. MORRIS, Defendant

Comes now Joseph W. Lipop, one of the Defendants named in the foregoing styled action, and on behalf of the co-defendant, Oscar H. Morris, suggests to the Court that the said Oscar H. Morris is now in the Military Service of the United States, having been inducted on or about May 10, 1942, and that he is now beyond the territorial limits of the United States of America, and is now serving in the European theatre of war; and this defendant further suggests in behalf of said co-defendant, Oscar H. Morris, that the said Oscar H. Morris has a good and valid and meritorious defense to the allegations contained in the bill of complaint filed herein, and on behalf of said Oscar H. Morris this defendant denies each and every of the allegations of said bill of complaint made against Oscar H. Morris.

Joseph W. Lipop.

Robert C. Lane, Jeptha P. Marchant, Solicitors for Defendant, Joseph W. Lipop.

[fol. 107] On October 11th, A. D. 1944 STATEMENT OF EDISON PARKER was filed in the words and figures as follows, to-wit:

87365

Statement of Edison Parker taken in the Office of the State Attorney on September 21, 1944, at 10:00 A. M., in the presence of Mr. Milledge and Nelle Robinson, stenographer.

(Witness sworn in.)

Mr. Milledge:

Q. Will you please state your name and place of residence?

A. Edison Parker, 2212 N. E. 2nd Court.

Q. Mr. Parker, were you at the Tee Pee Club, 5722 S. W. 8th Street last Monday afternoon when two deputy sheriffs came there?

A. Well, I probably was. I gave what I thought was the deputy sheriff my name and address.

Q. They requested it of you?

A. Yes.

Q. Were you in the room which is behind the dining room on the south end of the building. That is, the room faces away from 8th Street?

A. I probably was.

Q. How long had you been there?

A. Only a short time. Maybe five minutes, maybe ten. Not very long.

Q. About how many persons were there, would you estimate?

[fol. 108] A. Well, there were several, maybe eight or ten, possibly more.

Q. Were you there as a customer?

A. No. I was drinking some beer in the bar and was there for quite a while. I had a few beers and asked the bartender where the men's room was and he told me in the rear. I went in the place and when I came out, they stopped me and asked me about my draft card. I asked who it was and they said the deputy sheriffs.

Q. Did you have any trouble getting in that room?

A. No.

Q. Was the door closed?

A. No. I don't believe it was—yes, it was closed, but I walked right in.

Q. Was there a doorkeeper on the door?

A. No. I just walked right in.

Q. You weren't particularly hunting for a gambling room?

A. No. I didn't have gambling on my mind.

Q. Had you ever been in that room before?

A. I probably have, but I don't know just when.

Q. Had you ever been in that room before while they were using it for ho-se booking?

A. No.

Q. On these prior occasions what was going on back there?

A. I don't recall. A number of years ago, three or four years ago, I used to go out that way. I don't know whether I was there or not.

[fol. 109] Q. This Monday afternoon, what did you observe while you were in the room?

A. When I walked through the place, I asked where the laboratory was and the fellow said "there", and then I came out and the fellow stopped me and asked me to give him my draft card. I noticed several people at the table drinking.

Q. Did you hear the results of any races being announced?

A. No.

Q. Did you notice a counter with several men behind the counter?

A. (Indicated "no".)

Q. When you got back to that room, you recognized it as a horse booking place?

A. Not necessarily.

Q. You didn't see anything there to suggest to your mind you were in a horse booking room?

A. No.

Q. You didn't know you were?

A. No.

Q. You have been in horse booking rooms and know what they look like?

A. (Indicated "Yes".)

Q. Did you see wall charts that posted the results of the races?

A. No. I wasn't in there for that purpose. I only stayed about five minutes.

Q. What is your business, Mr. Parker?

A. At the present time I am manager of a rooming house.

[fol. 110] Q. You say you go out to the Tee Pee Club frequently?

A. No, sir.

Q. Who runs that place?

A. I don't know.

Q. Do you know the names of any of the people that work there?

A. (Indicated "no".)

Q. You don't live in that vicinity?

A. No.

Q. Why would you be going that far out of your way just to have a bottle of beer?

A. That wasn't my purpose. I was driving around with two other people and we had to stop.

(No further questions.)

I have read this statement carefully before signing it and after being sworn to the truth by the State Attorney after appearing in his office in answer to a subpoena this September 22, 1944.

Edison Parker.

I certify that the foregoing is an accurate transcription of the testimony given by the foregoing witness on September 21, 1944, pursuant to a subpoena issued at my request and after being sworn by me.

Stanley Milledge, State Attorney.

[fol. 111] On October 11th, A. D. 1944 STATEMENT OF CHARLES A. ANDERSON was filed in the works and figures as follows, to-wit:

87365

Statement of Charles A. Anderson taken in the Office of the State Attorney on September 21, 1944, at 10:10 A. M., in the presence of Mr. Milledge and Nelle Robinson, stenographer.

(Witness sworn in.)

By Mr. Milledge:

Q. Please state your name and place of residence.

A. Charles A. Anderson, 852 S. W. 12th Court.

Q. Mr. Anderson, are you one of the persons whom the deputy sheriffs asked for the names and addresses when they made an arrest at the Tee Pee Club at 5722 S. W. 8th Street, Miami, Dade County, Florida, last Monday?

A. He didn't ask me for it. I gave it to him.

Q. You don't work there, Mr. Anderson?

A. No, sir.

Q. You were placing bets on horses?

A. No. Glen Wheat gave me a bill and told me the week before to come and get it Monday.

Q. Were you talking to Glen Wheat when the deputy sheriffs came in?

A. No, I was ready to go out.

Q. Had you already talked to him?

A. Yes.

[fol. 112] Q. Was he in the horse book room?

A. Yes.

Q. Was he there when the sheriff came?

A. I don't know.

Q. Do you understand that he runs that place?

A. I don't know his relationship to the place.

Q. How long had you been back in that room when the deputy Sheriffs came in?

A. About half an hour.

Q. What was going on there in that room?

A. Just a minute. I'll be frank with you. I have been here twenty years. I don't want to talk unless I see my attorney. How many names did they take?

A. Nineteen.

A. I seen the deputy and asked him how many names he had taken and he said all of them, so I said I would give him my name. He should have taken all of them. There were about forty there.

Q. All I'm interested in, Mr. Anderson, is to get testimony as to what was going on at the place.

A. I think that's right, but I don't want to get my name in the paper. I want to do everything I can within the law, see?

Q. Right now, I'm not interested even in a criminal procedure. I'm interested in an injunction against the place. Your appearance before me, as State Attorney, is the same thing as an appearance in court. You are under [fol. 113] oath, so you have no adequate choice other than to testify to what you saw. Did you hear the results of the races being called.

A. Yes. I heard the results of the races being called.

Q. There were several men behind the counter?

A. Mr. Attorney, I don't like to discuss that without some advice from my counsel.

Q. It isn't a question of the counsel. It's a question of telling the truth. Nobody is involving you in a suit.

A. It's a question of the court, isn't it?

A. Yes, and you can't refuse to testify here anymore than you can in court. You are not charged with a crime. Only persons charged with a crime are entitled to see counsel.

A. How many people are here?

Q. I have subpoenaed everybody I know about.

A. All the people that were there?

Q. I don't know. I wasn't there. Mr. Anderson, while you were there did you hear the results of races being called over a loud speaker?

A. Yes, I did.

Q. Do you recall the results of the races at what tracks were being called?

A. I guess several tracks.

Q. Do you remember any of them?

A. They were at Chicago and New York.

Q. Were the results of the races posted where the people there could see?

A. I don't think any of the results were posted. I didn't [fol. 114] see them.

A. I don't know what you mean by results.

Q. Who won, who places and the prices.

A. Yes. They had some prices.

Q. Did you observe any telephones?

A. Yes. You could see one. No, I didn't, I'm not sure about that.

Q. Did you see any bets placed?

A. I don't know whether they were placing bets or not.

Q. Did you see any money in evidence there?

A. No. Yes, Mr. Glen Wheat paid me his bill.

Q. Did you see any person going up to the counter and paying or receiving any money?

A. A lot of people went up to the counter. I can't speak for them.

Q. Did you observe any money changing hands at the counter?

A. I saw people have money. I didn't pay any attention. I can't say. I wasn't listening.

Q. What were you doing there after you finished collecting your bill?

A. There was several people there I knew. One particular Man was a neighbor. I sat there with him and had one bottle of beer.

Q. Who was he?

A. McCormick. (McCurnack?)

Q. First name?

A. As mentioned there on the subpoena.

Q. Joseph McCurnack?

[fol. 115] A. I guess that's his name.

Q. Is 1320 S. W. 11th Street where he lived?

A. I think that's the one. He's not very far from where I live. I have known him some time.

Q. That room can only be entered by going outdoors, is that correct?

A. I don't know. I came in from outdoors.

Q. You parked at the parking lot behind?

A. Yes.

Q. And entered through the south door?

A. West. I came in the South door.

Q. How large is the room?

A. A pretty good sized room. I would say probably thirty by forty. That's just a guess.

Q. What's in that room. What furnishings and equipment?

A. Some chairs and tables.

Q. And a counter?

A. Yes, and a counter.

Q. Is that across one end of the room?

A. Yes, partly. It's in the senter of the room and one side.

Q. That's across the east side?

A. Yes. I guess that's east.

Q. Is there a rack there for scratch pads and racing forms?

A. (Didn't answer question.) I think the counter is on the south side. The trail runs east and west?

Q. Yes.

A. Then it's on the south side.

Q. Was there a rack for scratch pads and racing forms?

A. I didn't see them.

[fol. 116] Q. You saw racing forms and scratch pads in evidence while you were there?

A. Yes. I saw them on the tables.

Q. You saw people having drinks at various times, being served by the waiters?

A. Yes. I saw them come from the saloon. That place belongs to the saloon, don't it?

Q. When was the last time you were there?

A. I was there to see Wheat the week before then, the week previously.

Q. To collect that bill, the same bill?

A. Yes.

Q. The bill you collected has nothing to do with the gambling business?

A. That was a personal bill.

Q. Was Wheat there on the prior occasion when you were there?

A. Yes.

Q. In that same room?

A. Yes.

Q. What was he doing when you went there?

A. He wasn't doing anything when I went there. He was at the door when I talked to him.

Q. You say you are a contractor?

A. Yes, sir.

Q. Was the bill you sought to collect for work done on the premises at that place?

A. No. It was not.

Q. Did you make any bets at the Tee Pee Club, 5722 S. W. 8th Street, Miami, Florida, Dade County, on Septem-
[fol. 117] ber 18, 1944?

A. I don't want to answer that question.

Q. You don't have any choice.

A. I don't like to be made a monkey of. I don't like, without protection of law, to be made to answer. I don't think it's fair.

Q. Do you refuse to answer the questions?

A. As far as I'm concerned, I'm not worried about what happens to the man who owns the place. I don't know who owns it. I don't want to get myself in any scrape. I want to keep out of these political affairs.

Q. Will you answer the question, or do you refuse. That's what I want to know.

Q. All right. I made some bets there.

Q. That afternoon, that——

A. Yes, sir.

Q. Did you win any?

A. No. I didn't win any. I don't think so.

Q. Have you ever made any bets there before at any time?

A. Yes. A long time ago I made some bets there.

Q. How long?

A. I don't know. About six months or something.

Q. Were there a number of people there on that occasion as there were last Monday afternoon?

A. ——

Q. Did you win on that occasion?

A. Same sort of set up.

Q. Did you win on that occasion?

A. I've won and lost. I don't know. My betting doesn't [fol. 118] amount to anything, a couple of dollars.

Q. In the last couple of years, about how many times have you been there to make bets?

A. I can't tell you.

Q. Half a dozen?

A. I might have been there frequently. I don't know how many times.

Q. Did you make bets on these occasions?

A. Sometimes. Not every time.

Q. Did you see other people make bets on those occasions?

A. Yes.

Q. Did you see Clarence Wheat there on any of those occasions?

A. No.

Q. Did Clarence Wheat ever tell you he had any interest in that place?

A. No, sir.

Q. Do you have any financial interest in that place?

A. No, sir.

Q. Your only interest was as a patron?

A. Yes. I just wanted a little diversion and bet a dollar or two.

(No further questions.)

* * * * * * *

I have read this statement carefully before signing it and after being sworn to the truth by the State Attorney after appearing in his office in answer to a subpoena this September 21, 1944:

[fol. 119]

Charles Anderson.

I certify that the foregoing is an accurate transcription of the testimony given by the foregoing witness on September 21, 1944, pursuant to a subpoena issued at my request and after being sworn by me.

Stanley Milledge, State Attorney.

On October 11th, A. D. 1944 Statement of LOUIS FASANY was filed in the words and figures as follows, to-wit:

Statement of Louis Fasany taken in the Office of the State Attorney on September 21, 1944, at 10:44 A. M., in the presence of Mr. Milledge and Nelle Robinson, stenographer.

(Witness sworn in.)

By Mr. Milledge:

Q. Will you please give your name and place of residence?

A. Louis Fasany. My new residence is 1670 S.W. 10th Street.

Q. Mr. Fasany, were you at the Tee Pee Club at 5722 S.W. 8th Street, Miami, Dade County, Florida, last Monday afternoon when the two deputy sheriffs were at the gambling room which is just south of the dining room at the Tee Pee Club?

A. Let me explain just how I got to be there. In the [fol. 120] first place I may be speaking out of turn. I have never been there before. I worked at the 36 Street Air Port. I met a painter out there who told me if I ever needed any work that he would be hanging around the Tee Pee Bar. The garage apartment had to be painted, in and out of my house so I went out there to S.W. 8th Street and Red Road and went inside. There were a few men there and I asked if any of them had seen Jack, the painter, and they said "Go out and go in the back door." I went outside, went to the left, in another building and asked if the painter was there. They didn't know. I had hardly been there a minute when the men came in.

Q. How long were you there before the deputy sheriffs came in?

A. I just went in and asked for Jack, the painter. Before I could say "what," the man said "Be seated, we want everybody's name and address."

Q. When you first went there to inquire for this painter, whom did you talk to?

A. I went in and walked to the bar and asked for the painter.

Q. Did they tell you to go to that back door?

A. Yes. They said, "Go through the screen door and go to the left to the other building."

Q. Did anybody try to stop you at the door?

A. I don't know.

Q. No one did stop you?

A. No.

Q. It was just as easy to enter that room as when you entered the bar from the street?

A. Yes, sir.

[fol. 121] Q. How many people were in there?

A. I wouldn't swear to that.

Q. I'm asking you to estimate. Was it crowded?

A. There were people in there.

Q. Was the room well filled with people?

A. I would be a liar if I told you how many were in there. I don't want to be a liar.

Q. What were the people in there doing?

A. That I don't know. I do know they took my name and address.

Q. Were they standing up or sitting down?

A. Sitting down. Some of them were standing up, too.

Q. Did you notice any of them drinking?

A. Yes, sir. I went in and asked this man if he knew Jack, the painter. I had just gotten there. Then I looked around and heard a man say, "Everybody be seated and don't worry. I want your names and addresses."

Q. You had never been in there before?

A. No, sir. Never in my life.

Q. Did you hear the results of the horse races being called while you were there?

A. No, sir.

(No further questions.)

* * * * * * *

I have read this statement carefully before signing it and after being sworn to the truth by the State Attorney after appearing in his office in answer to a subpoena this September 21, 1944:

[fol. 122] Louis Fasany.

I certify that the foregoing is an accurate transcription of the testimony given by the foregoing witness on Septem-

ber 21, 1944, pursuant to a subpoena issued at my request and after being sworn by me.

Stanley Milledge, State Attorney.

On October 11th, 1944 Statement of Oscar G. Davis was filed in the words and figures as follows, to-wit:

87365

Statement of Oscar G. Davis taken in the Office of the State Attorney on September 21, 1944, at 11:05 A.M., in the presence of Mr. Milledge and Nelle Robinson, stenographer.

(Witness sworn in.)

By Mr. Milledge:

Q. Will you please state your name and place of residence?

A. Oscar G. Davis, 944 N.E. 2nd Avenue.

Q. Mr. Davis, were you at the Tee Pee Club, 5722 S.W. 8th Street, Miami, Florida, last Monday afternoon when two deputy sheriffs were there and at their request you gave them your name and address?

A. Yes, sir.

Q. About how many persons would you estimate were present at that time?

[fol. 123] A. Well, between seventy-five and a hundred, I should say.

Q. How long have you been there before the deputies arrived?

A. I came in about two. They came in about four.

Q. What had you been doing during those two hours?

A. I made bets on horses.

Q. Did you win any bets?

A. Yes, I won two and lost on four.

Q. Did you collect on those you won on?

A. Yes, sir.

Q. Did you observe other people making bets?

A. Yes, sir. Money changed hands.

Q. That was what that was. It was a horse booking room?

A. Yes, sir.

Q. How many employees or persons working there did you observe?

A. About five regularly.

Q. One called the results of the races received over the telephone and one man posted the results on the wall charts and three men selling or cashing tickets?

A. Yes, sir. Only one man on the board and only one door man. There may have been some others. I don't know.

Q. That wasn't the first time you have been there?

A. No, sir.

Q. About how often have you been there?

A. About four times.

Q. During what period of time?

A. Over the last two weeks.

Q. As far as you know, have they been running horse book there more than a couple of weeks?

[fol. 124] A. I don't think so. I remember one time they were closed when I went there.

Q. How did you discover they had opened up again?

A. A man on the street working for the tra-ks told me.

Q. When you went there did you have trouble getting in?

A. No, sir.

Q. Just walked in?

A. Yes, sir.

Q. Did you have to tell them who you were?

A. No, sir.

Q. Did you go with anybody or just by yourself?

A. By myself.

Q. Who appeared to be in charge?

A. I really don't know who was in charge. There were three men on the desks.

Q. Do you know Joe Lipop?

A. No. I don't know any of the names.

Q. Did you observe any drinks being served in the horse book room?

A. No. They served them there. I saw some beer.

Q. A colored, negro, waiter would bring drinks from the bar?

A. Yes, sir.

Q. That room is on the south end of the building, the end away from the trial?

A. Yes, sir.

Q. You have to go outdoors to get in there?

A. Yes, sir.

Q. Go out of the bar and go in the open?
[fol. 125] A. Yes. In the rear.
Q. You can park your car and enter from the south side?
A. Yes, sir.

(No further questions.)

* * * * * * *

I have read this statement carefully before signing it and after being sworn to the truth by the State Attorney after appearing in his office in answer to a subpoena this September 21, 1944.

Oscar G. Davis.

I certify that the foregoing is an acc-rate transcription of the testimony given by the foregoing witness on September 21, 1944, pursuant to a subpoena issued at my request and after being sworn by me.

Stanley Milledge, State Attorney.

On October 11th, A. D. 1944, STATEMENT OF W. H. CURNS, was filed in the words and figures as follows, to-wit:

Statement of W. H. Curns taken in the Office of the State Attorney on September 21, 1944, at 10:48 A. M., in the presence of Mr. Milledge and Nelle Robinson, stenographer.

[fol. 126] By Mr. Milledge: (Witness sworn in)

Q. Will you please state your name and place of residence?
A. W. H. Curns, 5739 S. W. 2nd Terrace.
Q. Mr. Curns, were you present at the Tee Pee Club, 5722 S. W. 8th Street, Miami, Dade County, Florida, last Monday afternoon when two deputy Sheriffs entered the place and requested the names of persons there?
A. Yes.
Q. Did you give your name to the deputy sheriff?
A. Yes.
Q. How long had you been there prior to that time?
A. About five minutes.
Q. Had you ever been in that particular room on any other prior occasion?
A. Yes.

Q. Did you go there frequently?

A. No. But I have been there.

Q. About how many times would your say you have been there during the last year?

A. Just a few times, I would say. Probably a half a dozen times. I couldn't say exactly. They haven't been open long.

Q. How long have they been open this last time?

A. Not long.

Q. A few months?

A. No. A couple of weeks, I would say. I don't know for [fol. 127] sure about that, but it hasn't been long.

Q. How many times have you been there during the last week or two?

A. About five times I would say.

Q. Did you go there each time for the purpose of making bets?

A. No. Only once.

Q. Did you make bets on that occasion?

A. Yes. A couple.

Q. Did you win any?

A. No.

Q. Lost them all?

A. Yes.

Q. You have won, though?

A. Yes.

Q. They paid off?

A. Yes.

Q. Did they announce the results of the races and post the results of the races on the chart?

A. Yes.

Q. How many people would you estimate were there this past Monday afternoon?

A. I guess fifty.

Q. They were coming and going?

A. Yes, naturally.

Q. In order for you to gain entrance to that room, did you ever have any difficulty getting in and out?

A. No.

Q. Did anyone have to introduce you?

A. No.

[fol. 128] Q. It was just the same as walking through the bar?

A. That's right.

Q. Do you consider it was open to the public?
A. I would think so.
Q. You never observed a guard at the bar?
A. They had a man to open the door.
Q. How many people would you estimate were working in that room?
A. I think it was four.
Q. One to call the races and post the results?
A. One at the board——
Q. And two to sell cash tickets?
A. Three.
Q. Three to do that?
A. Yes.
Q. And you would estimate five altogether?
A. That's right.
Q. Do you know those people?
A. I know the man who runs the place.
Q. Who was that?
A. Joe Lipop.
Q. Do you know Clarence Wheat?
A. No.
Q. You don't know whether he was around there?
A. I don't know.
Q. Do you know the names of the other persons?
A. No. I never saw them, in fact.
Q. During the times you have been there the past two [fol. 129] weeks, they were the same employees?
A. Yes.
Q. Did Lipop appear to be in charge?
A. It was all the same. I don't know whether he was in charge or not.
Q. You have seen him back there in the horse book place?
A. Oh, yes.
Q. Were persons back there served from the bar?
A. Yes.
Q. Were you ever served from the bar?
A. No. I don't think I have.
Q. But you observed the waiters bringing beer?
A. Yes.
Q. Have you ever been to that gambling room at any prior time when it was running?
A. No.
Q. Just the past two weeks?
A. That's right.

Q. How did you learn they were opened up and running?

A. I was at the Black Cat and seen them running.

Q. It was a matter of common knowledge that they were running?

A. Yes.

Q. Anybody would know it. They were not secretive about it?

A. They didn't seem to be.

(No further questions.)

* * * * * * * *

I have read this statement carefully before signing it and [fol. 130] after being sworn to the truth by the State Attorney after appearing in his office in answer to a subpoena this September 21, 1944.

W. H. Curns.

I certify that the foregoing is an acc-rate transcription of the testimony given by the foregoing witnes- on September 21, 1944, pursuant to a subpoena issued at my request and after being sworn by me.

Stanley Milledge.

On October 11th, 1944, Statement of JOSEPH MCCORMACK was filed in the words and figures as follows, to-wit:

87365

Statement of Joseph McCormack taken in the Office of the State Attorney on September 21, 1944, at 3:15 P. M., in the presence of Mr. Milledge and Nelle Robinson, stenographer.

(Witness sworn in.)

By Mr. Milledge:

Q. Will you please state your name and place of residence?

A. Joseph McCormack, 1320 S. W. 11th Street.

Q. Mr. McCormack, were you at the Tee Pee Club, 5722 S. W. 8th Street, Dade County, Florida, last Monday afternoon?

[fol. 131] A. Yes, sir.

Q. Were you in the room of the building which is behind the dining room?

A. Yes, sir.

Q. That's the room that's fitted up for horse book operations?

A. That's the way it was when I was there.

Q. How many persons would you estimate were there?

A. That's rather hard to say. I don't know. I would say maybe twenty-five, twenty, fifteen. This sounds rather unbelievable. I went there with the express purpose of betting a horse. I looked at my sheet where my horse was supposed to be and it had already run. Then the sheriffs came and said they were taking the names of all the people there. I gave my name and address. I can truthfully say that I hadn't been in there for more than fifteen or twenty minutes and there were between fifteen or twenty-five people. Now, if that's right or not, I don't know.

Q. How many employees would you estimate?

A. I couldn't tell you, sir. When I went in, I looked at the board and then walked over to the table where the newspapers were.

Q. That's the board from which the results of the races are posted?

A. That's right.

Q. Were any results of races called?

A. I can't truthfully answer that question, sir. It might [fol. 132] have been, it might not. When I looked at the board, from there I went over to the table. I couldn't say.

Q. Did you see any persons making any bets?

A. The actual exchange of money? I did not. I presume they did, of course.

Q. You say you went there for the purpose of making a bet. You had been there before?

A. No. I was in the bar. I presumed you could make one and went in there. I was in there too late because the horse had already run.

Q. Did you see the results of the race in which your horse ran?

A. My horse ran, yes, sir.

Q. Did you have any difficulty in getting in?

A. No.

Q. Did the people there know you?

A. No, sir. I know Henry, the bar tender.

Q. I mean the people of the bookie?
A. No sir.
Q. Was the door open?
A. No, sir.
Q. But it opened to admit you?
A. Yes, sir.

(No further questions.)

* * * * * * *

I have read this statement carefully before signing it and after being sworn to the truth by the State Attorney after appearing in his office in answer to a subpoena this Sep-
[fol. 133] tember 22, 1944:

Joseph McCormack.

I certify that the foregoing is an accurate transcription of the testimony given by the foregoing witness on September 21, 1944, pursuant to a subpoena issued at my request and after being sworn by me. The witness was excused until the statement could be typed, but did not return.

Stanley Milledge, States Attorney.

On October 11th, A. D. 1944 Motion to Suppress Testimony was filed in the words and figures as follows, to-wit:

(Caption omitted)

MOTION TO SUPPRESS TESTIMONY

Comes now Joseph W. Lipop, one of the defendants named in the above entitled action, by and through his Solicitors, Robert C. Lane and Jeptha P. Marchant, and moves the Court to suppress all of the evidence obtained by the arresting officers, Tom Burke and R. D. Hughes, on September 18, 1944, at and in the building and premises known as 5722 S. W. 8th Street, Miami, Florida, upon the following grounds:

1st. That the Officers falsely represented and stated at the time of obtaining such evidence that Officer Burke had in his possession a Search Warrant for said premises, when as a matter of truth and fact he did not have in his
[fol. 134] possession at the time of making the raid upon

said premises on September 18, 1944, a legally issued Search Warrant for said Premises, and said search was illegally and unlawfullly made by said Officers; that the said Officer Burke, in connnection with his statement that he did have such a Search Warrant, exhibited to this defendant a batch of papers which he represented as being a valid Search Warrant for said premises, whereupon this defendant permitted and allowed said Officers to enter upon the premises and obtain the evidence upon said false representation by said Officers that they had a Search Warrant covering the premises.

2nd. That the acts and deeds of the Officers in obtaining said evidences constituted an unlawful and illegal search and seizure of the premises located at 5722 S. W. 8th Street, Miami, Florida, and for this reason all such evidence obtained by said Officers, Tom Burke and R. D. Hughes, on September 18, 1944, during such illegal and unlawful search and seizure, should be suppressed by the Court.

Wherefore, this Defendant moves that this Court enter its Order herein suppressing all the evidence obtained by Officers Tom Burke and R. D. Hughes, on September 18, 1944, at and in the building and premises known as 5722 S. W. 8th Street, Miami, Florida, at the time of the alleged unlawful search and seizure, and that the bill for injunction herein filed may be dismissed.

Robert C. Lane, Jeptha P. Marchant, Solicitors for Joseph W. Lipop, Defendant.

———

[fol. 135] On October 11th, A. D. 1944 Opinion and Order was filed and on the 12th day of October A. D. 1944 was duly recorded in Chancery Order Book 702, on page 455, in the words and figures as follows:

(Caption omitted)

OPINION AND ORDER

HOLT, J.:

The state seeks to abate a nuisance (bookmaking) on the premises described in the amended bill.

It is contended and the evidence seeks to show that gambling in the form of bookmaking has been carried on

in a certain room separate and distinct from the main building (5722 S. W. 8th Street), with an entrance thereto facing Southwest 9th Street.

The witnesses on behalf of the State did not testify as to seeing any actual gambling, although one stated he saw some money pass and heard voices (while outside) calling races and the results thereof.

Five affidavits of persons who allegedly visited the premises for the purpose of placing bets were introduced (over the objection of the defendant) by the State. These go more into detail then the "live" witnesses before the court, but cannot be considered. The defendant cannot cross-examine an affidavit. The Court cannot determine who is testifying and whether belief can be placed upon such testimony. The manner and demeanor of the witness while testifying is lacking.

[fol. 136] It is an old saying (and a true one) that "anybody will sign an affidavit", and "you can prove anything by an affidavit". The fact that such affidavits were taken before the State Attorney does not give them any additional weight of value. It would be a vicious and unfair practice to take property upon such proof, (if it can be called such).

The inescapable conclusion is that the State has failed to prove its case by competent evidence. It is true this is not a criminal proceeding, yet the law is specific that the testimony should be of such character that it will sustain the allegations of the bill. Measured by such requirement it falls far short.

See Solomon vs. State, 156 So. 401, where it was announced that one "cannot be convicted on guess work and suspicion"; also Valdez vs. State, 194 So. 388.

It Is Thereupon Ordered, Adjudged and Decreed that plaintiff's motion for temporary injunction against the defendants be, and the same is hereby denied.

Done and Ordered at Miami, Florida, this 10 day of October, A. D. 1944.

George E. Holt, Circuit Judge.

On October 11th, A. D. 1944 Motion to Set Aside Order Denying Temporary Injunction was filed in the words and figures as follows, to-wit:

(Caption omitted)

[fol. 137] MOTION TO SET ASIDE ORDER DENYING TEMPORARY INJUNCTION

The State respectfully moves the Court to set aside the Order of October 10, 1944, in the above styled case, denying the State's application for temporary injunction of a public nuisance known as the "TeePee Club," 5722 S. W. 8th Street, and for grounds of such motion shows to the Court as follows:

From said Order it appears that the only reason assigned by the Court for denying temporary injunction is the insufficiency of the State's office to show the existence of a gambling house, defined to be a public nuisance under Section 823.05, Florida Statutes 1941, which reads as follows:

> "823.05 Places declared a nuisance; may be abated and enjoined. ——Whoever shall erect, establish, continue, or maintain, own or lease any building, booth, tent or place which tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals or manners of the people as described in Sec. 823.01, or shall be frequented by the class of persons mentioned in Sec. 856.02, or any house or place of prostitution, assignation, lewdness or place or building where games of chance are engaged in in violation of law or any place where any law of the State of Florida is violated, shall be deemed guilty of maintaining a nuisance, and the building, erection, place, tent or booth and the furniture, fixtures and contents are declared a nuisance. All such places or persons shall be abated or enjoined as pro-
> [fol. 138] vided in §§ 64. 11-64. 15."

More specifically it appears from said Order that the affidavits of persons present, as patrons, in the gambling establishment, there making bets on horse races, was considered by the Court as improper proof and "cannot be considered."

The proceedings in this, and similar cases, are expressly defined by *by* statute, Sections 64.11-64.15, Florida Statutes 1941, and Section 64.12 specifically provides that:

> "* * * If it shall appear to the satisfaction of the court, Judge or court commissioner by evidence or by affidavit that a temporary injunction shall issue, the court, judge or court commissioner may in his discretion pending the determination of the bill on a final hearing enjoin * * * Etc."

The sworn statements of patrons referred to were taken in the State Attorney's office pursuant to subpoenas issued and oaths administered, and the persons testifying were patrons of the gambling house, whose names were taken by the deputy sheriff making the arrest of one agent of the operator on September 18, 1944. Obviously, persons in this category would not be likely to make false statements in order to assist the State in suppressin- a gambling house as a nuisance; and we submit, therefore, that this form of proof is of far higher type than the usual affidavits of interested persons. The State, however, has not asked the Court, and does not ask now, that these statements be considered as more than affidavits, but in view of the fact [fol. 139] that under the statute proof by affidavit alone is quite sufficient we submit that there is no authority in law whatever to ignore this form of proof, but on the contrary it is very specifically provided for.

The State further points out that in chancery practice, generally, it is well established procedure to consider affidavits on application for temporary injunction. 32 C.J. 353 High on Injunctions, Second Ed. Sec. 1576.

While numerous other difficulties seemed to have been encountered by the State in the past on applications to suppress gambling houses as statutory public nuisance, so far as can be ascertained this is the first instance in which the use of affidavits has been assigned as a reason for refusing to enjoin.

The procedu-al statute above referred to in Section 64.15 specifically provides that "in such actions evidence of the general reputation of the alleged nuisance and place shall be admissible *for the purpose of proving the existence of said nuisance.*" Such evidence, obviously, is not admissible

in a criminal case, but this statutory rule of evidence is not only important as defining the prescribed quality of proof but clearly illustrates that the same rules of evidence applicable to a criminal case are not required when the State seeks to suppress a public nuisance. It is obvious from the quoted statute that proof of reputation alone is sufficient to warrant the injunction, both temporarily and permanently.

In this case proof of the reputation of the TeePee Club was established by the "affidavits" of the patrons, the testimony of deputy sheriff Burke; by the refusal of the de- [fol. 140] fendant, Lipop, to answer the State's questions touching his operations at the TeePee Club on the ground that such answers might tend to incriminate him; and by proof of prior arrests and convictions of persons operating gambling at this establishment; namely, Lee Mack, convicted October 1, 1942, George Burgess and Louis Myers, convicted August 10, 1944, and Joseph Lipop, one of the defendants and owner, arrested there November 6, 1943, and informed against by the County Solicitor for the felony of operating a gambling house, and still awaiting trial.

The circumstances surrounding the construction of the gambling room addition, and its peculiar arrangement of doors and windows twelve feet about the ground, indicate that it was built for the precise purpose of maintaining a gambling room in defiance of the laws. The Court will doubtless recall that the State asked Joseph Lipop "for what purpose he built this addition," and Lipop refused to answer on the ground that it might incriminate him, which refusal the Court sustained.

The Court will also recall that the defendant, Lipop, admitted ownership of the property by himself and Oscar H. Morris since 1940, and admitted operation and control of the entire premises at the time the suit was filed and for a considerable period prior thereto, and that Lipop had knowledge of the conviction of persons for operating gambling there.

The Court will also recall that the proof showed that the bar, night club and gambling room were all operated as a co-related single business, and that the gambling operations on September 18, 1944, and at various prior times, were large enough to require the services of five employees,

calling and posting the results of races and prices, taking [fol. 141] and paying bets, not to mention the waiters bringing drinks from the the bar to a large crowd of patrons assembled in the gambling room.

The distinction between a criminal prosecution and a suit by the State to suppress a nuisance has been many times pointed out by our Supreme Court. As illustrative of this we cite the following:

> "• • • Suppressing the place constituting a nuisance is a very different matter from prosecuting criminally those who commit felonious acts contributory to it, but the fact that the nuisance is abated by bill in equity is no bar to prosecution of those guilty of a felony contributing to it. This question was conclusively settled in the well considered opinion in Pompano Horse Club vs. State • • • Etc."
>
> Merry-Go-Round, Inc. v. State, ex Rel. Jones Sou. 186, Page 538; Text 539.

Even if the strict and technical rules of evidence in a criminal proceeding were applied, the testimony of the deputy sheriff alone that on September 18, 1944, he observed the usual paraphernalia of a horse booking room was quite sufficient to make a prima facie case for the State under Section 849.05, Florida Statutes 1941, which reads as follows:

> "849.05 Prima Facie evidence.—If any of the implements, devices or apparatus commonly *used* in games of chance in gambling houses or by gamblers, are found in any house, room, booth, shelter or other [fol. 142] place it shall be prima facie evidence that the said house, room, booth, shelter or other place where the same are found is kept for the purpose of gambling."

The Defendants had ample written notice of the hearing for injunction; the defendant, Lipop, was present, represented by three lawyers, and had, therefore, ample opportunity to refute the State's proof that the defendants owned, operated and controlled a gambling house, which constitutes a public nuisance. So far from refuting any

of the State's proof the defendant, Lipop, actually refused to answer many of the State's questions concerning his business there on the ground that it would tend to incriminate him, clearly evidencing his guilt of the State's charges; and in a proceeding to suppress a nuisance we submit that Lipop's invoking of constitutional guarantees against self incrimination corrobo-ated the truth of the State's proof, and at the very least cannot be taken as any sort of denial.

The obvious purpose of the statute defining gambling houses as public nuisances, and prescribing the procedure by which it is the duty of the State to suppress them, was to close such places as the TeePee Club. "When a State, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. Pompano Horse Club Co. vs. State, 111 So. 801."

The State asks for no indulgencies from the Court merely because its object is to enforce the law in the public interest. The State does not ask the Court to deprive these defend- [fol. 143] ants, or any other defendants, of one jot or title of any of their legal rights. The State simply asks the Court to apply the law which the legislature has defined under the procedure it has prescribed. None of the numerous counsel for the defendants, either by argument, brief or motion, nor has the Court in its Order of October 10, 1944, pointed out a single particular in which the State has failed to prove the existence of a public nuisance and in the precise manner as defined by law.

Wherefore, the State respectfully moves the Court to set aside the Order of October 10, 1944, and to have an Order on the proof heretofore submitted enjoining the defendants' premises as described in the bill, and as amended at the hearing, as a public nuisance pending a final hearing.

Stanley Milledge, as State Attorney in and for the 11th Judicial Circuit of Florida.

On October 12th, A. D. 1944 Order was filed and on the 13th day of October, A. D. 1944 was duly recorded in

Chancery Order Book 702, on page 489, in the words and figures as follows, to-wit:

[Caption Omitted]

ORDER

This cause coming on to be heard on the motion of the State Attorney to set aside the order therefore entered herein denying temporary injunction, the same having been [fol. 144] duly considered, and the State Attorney having waived argument and the court being fully advised in the premises:

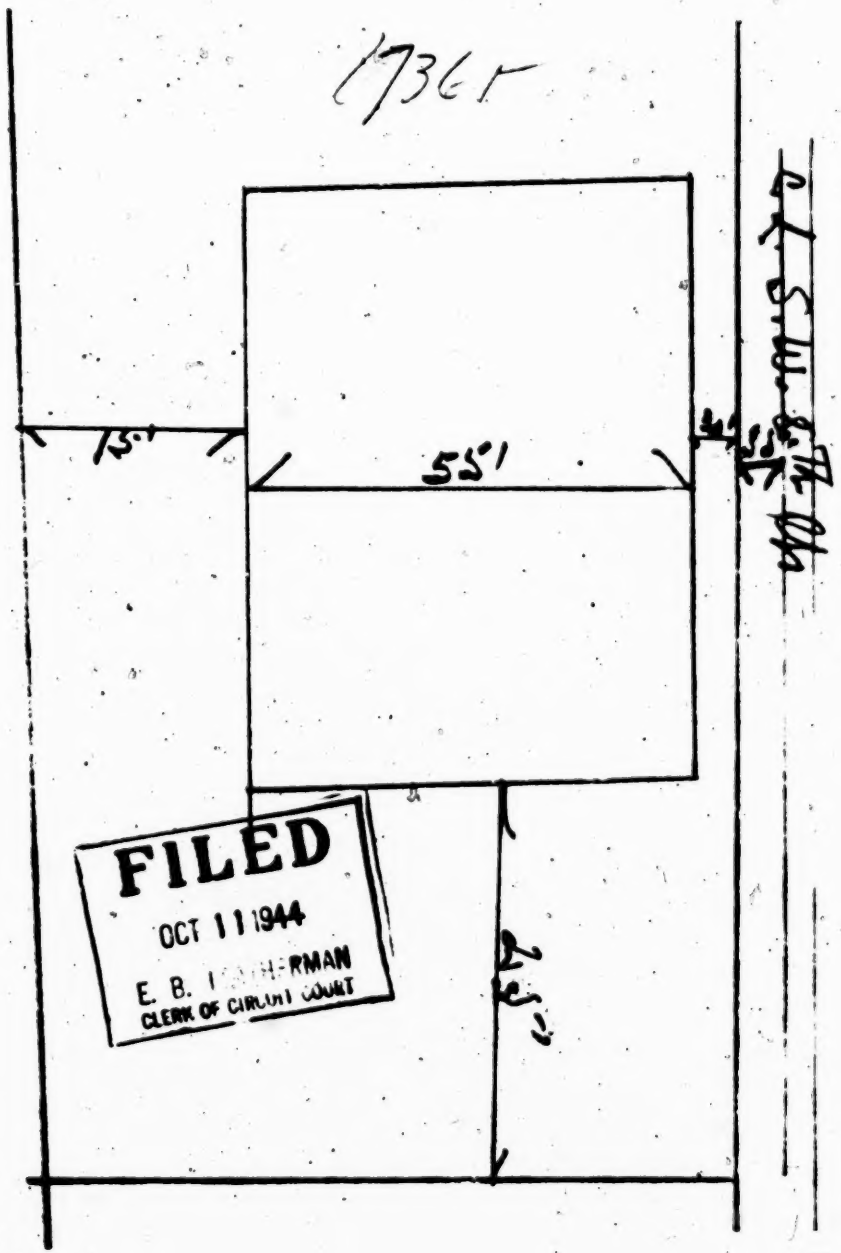
It is Thereupon Ordered, Adjudged and Decreed that said motion be, and the same is hereby denied.

Done and Ordered at Miami, Florida, this 12th day of October, A. D. 1944.

George E. Holt, Circuit Judge.

[Here follows 1 photolithograph, side folio 145.]

On October 11th, A.D. 1944 Diagram showing location of Building adjacent to S.W. 8th Street, Miami, Florida, was filed:



[fol. 146] State of Florida, County of Dade, ss

I, E. B. Leatherman, Clerk of the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, Do Hereby Certify that the foregoing pages numbered from one to 50 inclusive, contain a correct transcript of the record of the Judgment in the case of State of Florida, Ex Rel: Stanley Milledge, as State Attorney for the Eleventh Judicial Circuit of Florida, Plaintiff, against Joseph W. Lipop and Oscar H. Morris, Defendant, and a true and correct recital and copy of all such papers and proceedings in said cause, as appears from the records and files of my office.

In Testimony Whereof; I have hereunto set my hand and affixed the official seal of said Circuit Court on this the 21 day of November, A. D. 1944.

E. B. Leatherman, Clerk of the Circuit Court, by L. G. Woodward, Deputy Clerk. (Court Seal.)

[fols. 147-148] DEFENDANT'S EXHIBIT "B"

TRANSCRIPT OF RECORD FROM THE CIRCUIT COURT IN AND FOR THE COUNTY OF DADE IN THE CASE OF STATE OF FLORIDA, EX REL. STANLEY MILLEDGE, AS STATE ATTORNEY FOR THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, PLAINTIFF, V. THE BROOK CLUB, INC., ET AL., DEFENDANTS—Filed Nov. 28, 1944.

E. B. Leatherman, Clerk of Circuit Court

Chancery No. 84054-A

STATE OF FLORIDA EX REL. STANLEY MILLEDGE, AS STATE ATTORNEY for the Eleventh Judicial Circuit of Florida, Plaintiff,

vs.

THE BROOK CLUB, INC., et al., Defendants

[fol. 149] On March 22nd, A. D. 1944 Bill of Complaint was filed in the words and figures as follows, to-wit:

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY

No. 34054-A

STATE OF FLORIDA EX REL. STANLEY MILLEDGE, AS STATE ATTORNEY for the Eleventh Judicial Circuit of Florida, Plaintiff,

vs.

THE BROOK CLUB, INC., et al., Defendants

Injunction to Abate Nuisance

BILL OF COMPLAINT

The State of Florida, by Stanley Milledge, State Attorney in and for the Eleventh Judicial Circuit of Florida, as Relator, brings this bill of complaint against The Brook Club, Inc., a corporation organized and existing under the laws of the State of Florida, having its principal place of business in Dade County, Florida, Harry McLeod, whose permanent residence is unknown but who sojourns in Dade County during the winter tourist season, and William Maher, who resides in Dade County, Florida; and thereupon complaining said Relator informs the Court and alleges as follows:

1

There is now being conducted and for some time past [fol. 150] has been conducted and maintained in Dade County, Florida, within the town limits of the Town of Surfside, a well-known public nuisance in villation of Section 823.05, Florida Statutes 1941, known as "The Brook Club," which consists of a building on the land herein described, in which is maintained divers equipment and apparatus for engaging in unlawful games of chance, and where various unlawful games of chance are engaged in for money in violation of the laws of Florida, which games are played for usually large but sometimes relatively small sums of money in the form of wagers, bets and stakes, and include the games of roulette, craps or dice, and various forms of gambling with cards.

2

Said building is situated upon land facing east on Harding Avenue between 94th and 95th Streets in the Town of Surfside, Dade County, Florida, particularly described as follows, to-wit:

Lots 1 to 8 both inclusive, Lots 27 to 32 both inclusive, in Block 5 of Altos Del Mar No. 6, a subdivision according to the plat recorded in Plat Book 7, page 106, Public Records of Dade County, Florida, also the unnumbered lot or parcel in the Southeast corner of said Block 5 of said Subdivision; all in Dade County, Florida.

Said building contains a bar, some facilities for preparing and serving food, musical entertainment and a place for the [fol. 151] guests to dance, but the serving of food and drinks and the entertainment is only incidental to the primary purpose of maintaining and operating an unlawful gambling house.

3

The principal unlawful games engaged in on said premises as aforesaid are roulette, craps or dice, and various kinds of gambling at cards including chemin-de-fer, which several games are conducted by means of tables, wheels, dice, cards and other equipment in the usual manner but conducted on an extensive scale. The name "Brook Club" and whatever semblance the operators of said establishment use to make it appear that admission to said establishment is limited to members of a private club, are mere subterfuge; the said premises and the unlawful games of chance played therein are open without substantial obstacles to a large class of the public; the said establishment is a well-known gambling house; the nature of which is a matter of common knowledge, and the said premises constitute a public nuisance under the law. Relator alleges that notwithstanding the statutes against the maintenance of gaming houses and despite the public pronouncement from time to time by public officials charged with the duty of uniformly enforcing the criminal laws of the State of Florida (and notwithstanding the protestations of the defendants heretofore filed in Chancery cause # 61247-D in this Court that the said defendants had per-

manently desisted from operating an unlawful gambling house on said premises), the said premises have been by common repute maintained and conducted as aforesaid by the defendants from and after about January 13, 1944 [fol. 152] without substantial interruption and that the said defendants continue so to conduct and maintain the same in defiance of the laws of the State of Florida and of the public officials charged by law with the duty to enforce said laws.

That recently, on March 18, 1944, there were many persons, to-wit: 200 or more in said premises, many of whom are engaged in playing various of said unlawful games of chance; that said unlawful games of chance have likewise been engaged in by divers persons, and said defendants have maintained and conducted said place for said persons before and since said time; that the location, nature and purpose of said place are commonly and widely known to such an extent that they are subjects of common discussion; that the maintenance of said place for the purposes and in the manner aforesaid constitutes an unlawful public nuisance and tends further to bring Dade County and the cities within said County into national disrepute.

4

Relator alleges that according to the Public Records of Dade County, Florida, the defendant The Brook Club, Inc. (of which Ray Semmes is President, A. M. Dewey, Vice President, J. M. Dunne, Secretary, and R. B. Gautier, Jr. Resident Agent) is the owner of the above described real estate, and that the defendants Harry McLeod and William Maher (in the guise of some legal fiction unknown to Relator) actively operate, manage and conduct the said gambling establishment in the manner and for the purpose [fol. 153] aforesaid, and that unless restrained said defendant will continue to operate and conduct the same or will permit it to be operated and conducted at said premises indefinitely, in open disregard, violation and defiance of the laws of Florida, in willful contempt and disregard of and to the injury and corruption of the public morals and decency of Dade County and the State of Florida.

5

Relator alleges that heretofore on February 13, 1940 the State of Florida on the relation of George Couper Gibbs, the then Attorney General, in Chancery cause #61247, brought a bill in this Court to enjoin the premises herein described and against the defendants The Brook Club, Inc., Harry McLeod, William Maher, and others, from maintaining a public nuisance under Section 823.05, Florida Statutes of 1941, then designated as Section 7832, Compiled General Laws of Florida 1927, to which bill the defendant, The Brook Club, answered (the other defendants adopting the answer) admitting the operation of illegal gambling but asserting that its reason for violating the laws of Florida was that "this defendant, believing that, because of the apathy or sympathy of the local community in which its club is situated and of Dade County generally, the statutes prohibiting gaming would not be strictly enforced by officers of the law, encouraged and cooperated with the operators of the gambling room in the said building. This defendant especially believed that a place, located as its club is and conducted on the high plane that such club has been conducted, would not be molested by law enforcement officers [fol. 154] even if it should be generally known that unlawful games of chance should be permitted and encouraged in such place * * *. This defendant however became thoroughly convinced, prior to the institution of this suit, that the Sheriff of Dade County, Florida, and his deputies would no longer tolerate or permit illegal gaming on this defendant's premises or elsewhere in Dade County. This defendant immediately caused its lessees and tenants to discontinue and abandon their gambling operations. Prior to the institution of this suit this defendant had voluntarily and in good faith permanently abated the nuisance of which the relators complain in the bill of complaint filed herein. The cessation of the unlawful practices which it had heretofore permitted is not a mere temporary cessation. This defendant does not intend to and will not permit a revival or renewal of such practices. The voluntary abatement by it of the nuisance complained of herein is bona fide and permanent * * *. Furthermore, the Sheriff and other law enforcement officials of Dade County are performing and discharging their duties in the enforcement of the laws against gaming and gambling and the methods and means

employed by them in the performance and discharge of their duties are effective in compelling obedience to such statutes and the statutes and laws forbidding the creation and maintenance of nuisances; and, therefore, no necessity exists for invoking the aid of a court of equity in this suit."

In said cause the Circuit Court of Dade County, by reason of the defendant's answer above referred to and the reliance of the State of Florida upon such representations, [fol. 155] denied the application for temporary restraining order but retained jurisdiction so that the State could renew the application for a restraining order "if it be shown that the operation of the nuisance complained of shall have been resumed hereafter or that the defendants shall not have performed or complied with such representations."

Thereafter on April 28, 1941, the then Attorney General, the Honorable J. Tom Watson, filed a motion in said cause to withdraw the name of the Attorney General as a party plaintiff, upon which motion the cause was dismissed by the Court on May 12, 1941, for lack of plaintiff.

6

The proceedings heretofore brought by the State of Florida, referred to in the preceding paragraph, show the period of time during which these defendants have successfully flouted the laws of the State of Florida, and show further that the representations by said defendants as to their good faith in terminating their unlawful gambling operations are utterly worthless and unreliable and that no confidence whatever can be placed in the representations of said defendants, and show that said defendants have a disregard for the courts of this State as well as for the law enforcement officials of Dade County, Florida.

Wherefore it is respectfully prayed on behalf of the State of Florida that the Court temporarily restrain and enjoin the defendants, their agents, servants and employees, from conducting, maintaining or operating or from permitting to be maintained, conducted or operated each and every or [fol. 156] any of said unlawful games of chance or any unlawful game of chance on said premises or elsewhere in said County, and from maintaining on or near the same any equipment or apparatus designed and intended for use in unlawful gambling; that the defendants until further order be enjoined from using or permitting said premises to be

used for any purpose whatsoever and that upon final hearing said injunction be made permanent and perpetual; and that the defendants be required to pay the costs of this suit and that a lien therefore be decreed in favor of the State upon the property and fixtures in said premises or upon said real estate and building.

Stanley Milledge, As State Attorney in and for the Eleventh Judicial Circuit of Florida.

[fol. 157] On March 30th, A. D. 1944 Summons was filed in the words and figures as follows, to-wit:

Case No. 84054

Summons in Chancery

The State of Florida

To The Brook Club, Inc., a Florida corporation, Harry McLeod, William Maher:

You are hereby notified that a suit has been brought against you in the Circuit Court for Dade County, Florida, in Chancery, by State of Florida ex rel. Stanley Milledge, as State Attorney for the Eleventh Judicial Circuit of Florida, and you are hereby required to file with the Clerk of said Court your written Appearance (personally or by Attorney) in said suit on the first Monday in April, A. D. 1944, being the 3rd day of said month, and thereafter to file with said Clerk your written defenses, if any, to the bill of complaint in said suit at the time prescribed by law.

Herein fail not or judgment will be entered against you by default.

Witness my hand and seal of said Court, at Miami, Dade County, Florida, this 22 day of March, A. D. 1944.

E. B. Leatherman, as Clerk of said Circuit Court, by Wm. W. Stocking, Deputy Clerk. (Circuit Court Seal.)

[fol. 158] Filed Sheriff's Office. 1944 Ma. 22 P. M. 4 40. Dade County, Florida.

No. 84054

Original Return

Received this Subpoena in Chancery on the 22nd day of March, 1944 and returned the same unexecuted for the reason that after diligent search failed to fine any officer or agent of the within named corporate defendant, to-wit: The Brook Club, Inc., a Florida corporation, in Dade County, Florida, upon whom this process could be served; and returned the same unexecuted for the reason that after diligent search failed to find the within named defendants, to-wit: Harry McLeod and William Maher, in Dade County, Florida.

Copy and return .60. D. C. Coleman, Sheriff, Dade County, Florida, by H. Cheetham, D. S.

[fol. 159] On March 25th, A. D. 1944 Praecipe for Witness Supboena was filed in the words and figures as follows, to-wit:

(Caption omitted)

Praecipe for Witness Subpoena

The Clerk of the above named Court will please issue a witness subpoena in the above entitled cause directed to the following:

Harry McLeod, 9199 Collins Ave., Surfside, Fla.
Ray Semmes, 4601 North Bay Road, Miami Beach, Fla.
William Maher, 4630 Pine Tree Drive, Miami Beach, Fla.
F. W. Hackett, Chief of Police, Surfside, Fla.
A. M. Dewey.
J. M. Dunne.

returnable before the Judges of the above named Court at the Court House in Miami, Dade County, Florida, on the 28th day of March, A. D. 1944, at the hour of 2:30 P. M. o'clock and oblige.

Stanley Milledge, State Attorney.

[fol. 160] On April 1st, A. D. 1944 Witness Subpoena was filed in the words and figures as follows, towit:

Witness Subpoena—Civil

In the Name of the State of Florida

#64054

State of Florida,
County of Dade, ss:

To All and Singular the Sheriffs of the State of Florida:

You are hereby requested to summon Harry McLeod, 9199 Collins Ave., Surfside, Fla., Ray Semmes, 4601 North Bay road, Miami Beach Fla. William Maher, 4630 Pine Tree Drive, Miami Beach, Fla., A. M. Dewey, J. M. Dunne, F. W. Hackett, Chief of Police, Surfside, Fla. personally to be and appear before the Judge of our Circuit Court of the Eleventh Judicial Circuit of the State of Florida, at the Court House in Miami on the 28th day of March, A. D. 1944, at 2:30 P. M. to testify in behalf of the —— in a certain suit pending in said Court, wherein State of Florida, Ex Rel. Stanley Milledge, as State Attorney for the 11th Judicial Circuit of Florida is Plaintiff and The Brook Club, Inc., et al., Defendants, and herein fail not under penalty of law.

Witness, the Honorable Paul D. Barns, Ross Williams, Richard H. Hunt, George E. Holt, Marshall C. Wisecheart, and Arthur Gomez, Judges, et al. as also E. B. Leatherman, Clerk, and the Seal of said Court at the Court House in Miami, Florida, this 25th day of March, A. D. 1944.

E. B. Leatherman, Clerk of the Circuit Court, By Wm. W. Stocking, Deputy Clerk. (Circuit Court Seal.)

—— ——, Attorney.

[fol. 161] SHERIFF'S OFFICE

Filed Ma 25 1944 10 03 A M

DADE COUNTY, FLORIDA:

Received this writ on the — day of —— A. D. 194–, and executed the same in the County of ——, Florida, on the — day of ——, A. D. 194–, by —— ——. I, Ernest E. Roberts hereby accepts service for the following named witnesses, as Attorney.

Harry McLeod.
William Maher.

Served F. W. Hackett. 3-27-44. 26 M. No service on Semmes, Dewey or Dunne. All in the North. 3-27-44.

Ernest E. Roberts, as Attorney.

Sheriff of —— County, Fla., By —— ——, Deputy Sheriff.

On March 30th, A. D. 1944 Praecipe for Witness Subpoena was filed in the words and figures as follows, to-wit:

(Caption omitted)

PRAECIPE FOR WITNESS SUBPOENA

The Clerk of the above named Court will please issue a [fol. 162] witness subpoena in the above entitled cause directed to the following:

Harry McLeod, 9199 Collins Ave., Surfside, Fla.
William Maher, 4630 Pine Tree Drive, Miami Beach, Fla.
Ray Semmes, 4601 North Bay Road, Miami Beach, Fla.
A. M. Dewey.
J. M. Dunne.
Charles Robbins, Deputy U. S. Marshal.
Lt. C. O. Huttoe, Miami Police Dept.
F. W. Hackett, Chief of Police, Surfside, Fla.
Francis A. Rogers, Dade County Tax Payers' Assoc., 7114 Collins Ave., M. B.
Dr. J. A. Tucker, Dade County Tax Payers' Assoc., 7114 Collins Ave., M. B.
Mrs. Willie Rita Whitener, c/o Harrison Photo Lab., 2930 N. W. 7th Ave., Miami.

returnable before the judges of the above named Court at the Court House in Miami, Dade County, Florida, on the 4th day of April, A. D. 1944, at the hour of 2:30 P. M. o'clock, and oblige.

H. Frost Bailey, Asst. State Attorney.

[fol. 163] On April 3rd, A. D. 1944 Witness Subpoena was filed in the words and figures as follows, to-wit:

Witness Subpoena—Civil

IN THE NAME OF THE STATE OF FLORIDA

84054

STATE OF FLORIDA,
County of Dade, ss:

To All and Singular the Sheriffs of the State of Florida:

You are hereby requested to summon A. M. Dewey, J. M. Dunne, Charles Robbins, Deputy U. S. Marshal, U. S. Marshal's Office; Lt. C. O. Huttoe, Miami Police Dept. personally to be and appear before the Judges of our Circuit Court of the Eleventh Judicial Circuit of the State of Florida, at the Court House in Miami on the 4th day of April, A. D. 1944, at 2:30 P. M., to testify in behalf of the State in a certain suit pending in said Court, wherein State of Florida ex rel. Stanley Milledge, etc. is Plaintiff and Brook Club, Inc. et al., Defendant, and herein fail not under penalty of law.

Witness, the Honorable George E. Holt, Judges, as also E. B. Leatherman, Clerk, and the Seal of said Court at the Court House in Miami, Florida, this 30th day of March, A. D. 1944.

E. B. Leatherman, Clerk of the Circuit Court, by Wm. W. Stocking, Deputy Clerk. (Circuit Court Seal.)

Stanley Milledge, State Attorney.

SHERIFF'S OFFICE

Filed May 30 1944 4 25 P. M. Dade County, Florida

[fol. 164] (The following endorsement appears in pencil on the reverse side of Subpoena.)

No service on Dunne or Dewey, both left Miami sometime ago. Now living in the North. 3-31-44.
Served Robbins & Huttoe 3-31-44 2 M

1 40
50
25
40

2 55

H. Cheetham.

On April 4th, A. D. 1944 Witness Subpoena was filed in the words and figures as follows, to-wit:

Witness Subpoena—Civil

In the Name of the State of Florida

64054

State of Florida,
County of Dade, ss:

To All and Singular the Sheriffs of the State of Florida:

You are hereby requested to summon:

Harry McLeod, 9199 Collins Avenue, Surfside, Fla.
William Maher, 4630 Pine Tree Drive, Miami Beach, Fla.
Ray Semmes, 4601 North Bay Road, Miami Beach, Fla.,

[fol. 165] personally to be and appear before the Judges of our Circuit Court of the Eleventh Judicial Circuit of the State of Florida, at the Court House in Miami on the 4th day of April, A. D. 1944, at 2:30 P. M., to testify in behalf of the State in a certain suit pending in said Court, wherein State of Florida ex rel. Stanley Milledge, etc. is Plaintiff, and The Brook Club, Inc. et al. Defendant, and herein fail not under penalty of law.

Witness, the Honorable George E. Holt, as also E. B. Leatherman, Clerk, and the Seal of said Court at the Court House in Miami, Florida, this 30 day of March, A. D. 1944.

E. B. Leatherman, Clerk of the Circuit Court, by Wm. W. Stocking, Deputy Clerk. (Seal.)

Stanley Milledge, State Attorney.

Filed Sheriff's Office, 1944 Ma 30 P M 4 25.

(The following endorsement appears in pencil on the reverse side of Subpoena.)

No service on Semmes, living in Baltimore, Md. 3-31-44.
No service on Harry McLeod, out of Miami. 4-3-44.
Served William Maher. 4-3-44. 16 m.

1.05
25
2.00
30

3.60

H. Cheetham.

[fol. 166] On April 4th, A. D. 1944 Witness Subpoena was filed in the words and figures as follows, towit:

Witness Subpoena—Civil

In the Name of the State of Florida

State of Florida,
County of Dade, ss:

To All and Singular the Sheriffs of the State of Florida:

You are hereby requested to summon F. W. Hackett, Chief of Police, Surfside, Fla., Francis A. Rogers, Dade Co. Tax Payers' Assoc. 7114 Collins Ave., Miami Beach, Dr. J..A. Tucker, Dade Co. Tax Payers' Assoc. 7114 Collins Ave., Miami Beach, Mrs. Willie Rita Whitener, c/o Harrison Photo Lab. 2930 N. W. 7 Ave., Miami, personally to be and appear before the Judges of our Circuit Court of the Eleventh Judicial Circuit of the State of Florida, at the

Court House in Miami on the 4th day of April, A. D. 1944, at 2:30 P. M., to testify in behalf of the State in a certain suit pending in said Court, wherein State of Florida ex rel. Stanley Milledge, etc. is Plaintiff and The Brook Club, Inc. et al., Defendant, and herein fail not under penalty of law.

Witness, the Honorable George E. Holt, Judges, as also E. B. Leatherman, Clerk, and the Seal of said Court at the Court House in Miami, Florida, this 30th day of March, A. D. 1944.

E. B. Leatherman, Clerk of the Circuit Court, by Wm. W. Stocking, Deputy Clerk. (Seal.)

Stanley Milledge, State Attorney.

[fol. 167] Filed Sheriff's Office, 1944 Ma 30 P M 4 25. Dade County, Florida.

(The following endorsement appears in pencil on the reverse side of Subpoena.)

Served Willie R. Whitener. 6 M 3-31-44.
Served Hackett, Rogers and Tucker. 4-1-44.
26 M.

1.40
1.00
3.25
.40

6.05

H. Cheetham.

On March 30th, A. D. 1944, Notice of Hearing was filed in the words and figures as follows, to-wit:

[Caption omittede]

NOTICE OF HEARING ON APPLICATION FOR TEMPORARY RESTRAINING ORDER

[fol. 168] To: The Brook Club. Inc.—Officers; Ray Semmes, President, 4601 North Bay Road, Miami Beach; A. M. Dewey, Vice-President; J. M. Dunne, Secretary; and Harry McLeod, 9199 Collins Avenue, Surfside, Florida; and William Mather, 4630 Pine Tree Drive, Miami Beach, Florida.

You Are Hereby Notified that the Relator in the above styled cause will apply to the Honorable George E. Holt,

one of the Judges of the above styled Court, for a temporary restraining order on Tuesday, March 28, 1944, at 2:30 P. M. in the chambers of Judge Holt in the Dade County Court House.

Dated at Miami, Florida, this 23rd day of March, A. D. 1944.

Stanley Milledge, as State Attorney in and for the Eleventh Judicial Circuit of Florida.

Received the foregoing notice this — day of March, A. D. 1944.

The Brook Club, Inc., by ——.—— (Name and Title), Harry McLeod, William Maher.

Filed Sheriff's Office 1944 Ma. 23 P. M. 3 04 Dade County, Florida. No Service. .60¢. D. C. Coleman, Sheriff, Dade County, Florida, by H. Cheetham, D. S.

[fol. 169] On April 3rd, A. D. 1944, Motion to Dismiss Bill of Complaint was filed in the words and figures as follows, to-wit:

[Caption omitted]

MOTION TO DISMISS BILL OF COMPLAINT

The defendants jointly and severally move the Court to dismiss the bill of complaint filed herein because:

1. It is not alleged or shown in or by the bill of complaint that the public officials of Dade County, Florida are not discharging, or have failed, neglected or refused to discharge, their duties in the enforcement of the criminal laws of the State of Florida or in the prosecution of violators of such laws, and it is not alleged or shown in or by the bill that ordinary legal methods and means would not be effective in compelling obedience to statutes forbidding the creation and maintenance of public nuisances and in abating the alleged public nuisance mentioned and described in the bill.

2. The Court may and should decline the exercise of its equitable jurisdiction to abate the alleged public nuisance inasmuch as it is not alleged or shown in or by the bill that the public officials are not discharging, or have failed, neg-

lected or refused to discharge, their duties in the enforcement of the criminal laws of the State of Florida or in the [fol. 170] prosecution of violators of such laws, and it is not alleged or shown in or by the bill that ordinary legal methods and means would not be effective in compelling obedience to statutes forbidding the creation and maintenance of public nuisances and in abating the alleged public nuisance.

3. It is not shown in or by the bill that there is any necessity for the exercise by the Court of its equitable jurisdiction to abate the alleged public nuisance.

4. The public officials of Dade County, Florida, by discharging their duties and by the employment of ordinary legal methods and means, could and should effectively abate the alleged public nuisance, if it exists.

5. There is an adequate legal remedy.

Ernest E. Roberts, Vincent C. Giblin, Solicitors for Defendants, by Vincent C. Giblin, of Counsel.

On April 4th A. D. 1944 Notice of Hearing was filed in the words and figures as follows, to wit:

NOTICE OF HEARING ON APPLICATION FOR TEMPORARY RESTRAINING ORDER

[fol. 171] To: The Brook Club, Inc., Ray Semmes, President, 4601 North Bay Road, Miami Beach, Florida; Harry McLeod, 9199 Collins Avenue, Surfside, Florida; William Maher, 4630 Pine Tree Drive, Miami Beach, Florida, and Earnest Roberts, as Attorney for the Above Named Defendants, Security Building, Miami, Florida.

You Are Hereby Notified that the relator in the above styled cause will apply to the Honorable George E. Holt, one of the Judges of the above styled Court, for a temporary restraining order on Tuesday, March 28, 1944, at 2:30 P. M. in the chambers of Judge Holt in the Dade County Court House.

Dated at Miami, Florida, this 24th day of March, A. D. 1944.

Stanley Milledge, as State Attorney in and for the Eleventh Judicial Circuit of Florida.

AFFIDAVIT OF MAILING

STATE OF FLORIDA,
County of Dade, ss:

On this day personally appeared before me, the undersigned authority, Billie Gillespie, who being first duly sworn says that she is employed in the office of Stanley Milledge, State Attorney for the Eleventh Judicial Circuit of Florida; that on March 24, 1944, she served a true copy of the above and foregoing Notice on each of the above defendants and their above named attorney by placing same in envelopes [fol. 172] addressed to said persons at their respective addresses shown above; that she placed on said envelopes sufficient uncanceled United States postage to carry same to their destination, and placed same in the United States mail at the main Post Office, Miami, Florida, prior to 5:30 P. M. on said date.

Billie Gillespie.

Subscribed and sworn to before me this 24th day of March, A. D. 1944. Annabel McGraw, Notary Public, State of Florida. My commission expires May 2, 1945. (N. P. Seal.)

On April 5th, A. D. 1944 Order Denying Motion to Dismiss was filed and on the 5th day of April, A. D. 1944 was duly recorded in Chancery Order Book 685, on page 104, in the words and figures as follows, to-wit:

[Caption omitted]

[fol. 173] ORDER DENYING MOTION TO DISMISS

This cause was today heard on the motion of the defendants to dismiss the bill of complaint filed in the cause. The Court has heard the argument of counsel for the respective parties on the motion and is duly advised in the premises.

It is Ordered, Adjudged and Decreed that the said motion be, and it is, denied.

It is further Ordered, Adjudged and Decreed, on the oral application of the defendants, that all further proceedings in the cause be, and they are, stayed for a period of ten days from and after the date of this order so that within such

period the defendants may apply to the Supreme Court of Florida for a writ of certiorari for the purpose of having the appellate court review this order.

Done and Ordered in chambers at and in the City of Miami, Dade County, Florida, April 4, 1944.

George E. Holt, Circuit Judge.

[fol. 174] On April 7th A. D. 1944 Application for Supersedeas and Stay was filed in the words and figures as follows, to-wit:

[Caption omitted]

APPLICATION FOR SUPERSEDEAS AND STAY

The defendants represent and show to the Court that on April 4, 1944 the Court made in the cause its order (which was recorded on April 5, 1944 in Chancery Order Book 685, at page 104) in and by which the defendants' motion to dismiss the bill of complaint filed in the cause was denied; that in and by the said order all further proceedings in the cause were stayed for a period of ten days from and after the date of the said order (April 4, 1944) "so that within such period the defendants may apply to the Supreme Court of Florida for a writ of certiorari for the purpose of having the appellate court review" the order denying the said motion, and that such stay will expire, unless extended, on April 14, 1944.

The defendants further represent and show to the court that the defendants' solicitors, since the making of the said order, having been diligently and continuously engaged in the preparation of their petition for certiorari, a transcript of the record of the proceedings in the cause and an accompanying brief in support of the petition; that on Monday, April 10, 1944, the petition, the transcript and the brief will be filed in the Supreme Court of Florida; and that on or before April 10, 1944, the State Attorney will be furnished a copy of such petition, a copy of such transcript and a copy [fol. 175] of such brief.

The defendants further represent and show to the Court that (by virtue of the provisions of Rule 28 (c) of the Supreme Court rules) the State Attorney will have ten days

after he is furnished a copy of such brief within which to file his brief in opposition; but the State Attorney has orally stated to counsel for the defendants that he will file his brief in the Supreme Court before Monday, April 17, 1944, and he and counsel for the defendants have orally agreed, subject to the approval of the Supreme Court, that the cause shall be orally argued before the Supreme Court on Monday, April 17, 1944, at 9:30 o'clock in the afternoon, or as soon thereafter as counsel may be heard.

The defendants further represent and show to the Court that the matter cannot and will not be heard by the Supreme Court before Monday, April 17, 1944.

The defendants, therefore, apply, under and pursuant to the provisions of Rule 35(f) of the Supreme Court rules for the entry herein by the Court of an order in and by which the Court shall grant a supersedeas and stay on the defendants' giving a good and sufficient bond which shall be conditioned that their petition for certiorari shall be duly presented to the Supreme Court within twenty days and that they shall pay all costs, damages and expenses occasioned by reason of the stay of proceedings in the event the order of which a review is sought shall not be quashed, modified or reversed, and which shall contain such further conditions as may be fixed by the Court.

April 7, 1944.

Ernest E. Roberts, Vincent C. Giblin, Solicitors for Defendants, by Vincent C. Giblin.

[fol. 176] On April 17th, A. D. 1944 Praecipe for Witness Subpoena was filed in the words and figures as follows, to-wit:

[Caption omitted]

PRAECIPE FOR WITNESS SUBPOENA

The Clerk of the above named Court will please issue a witness subpoena in the above entitled cause directed to the following:

William M. Hurley, 515 N. E. 123 Street, North Miami, returnable before the Judges of the above named Court at the Court House in Miami, Dade County, Florida; on the 20

day of April, A. D. 1944, at the hour of ten o'clock A. M., and oblige.

H. Frost Bailey, Asst. State Attorney.

On April 26th, A. D. 1944, Witness Subpoena was filed in the words and figures as follows, to-wit:

[fol. 177] In the Name of the State of Florida

84064

Witness Subpoena—Civil

State of Florida,
County of Dade:

To All and Singular the Sheriffs of the State of Florida:

You are hereby requested to summon William M. Hurley, 515 N. E. 123 Street, North Miami, personally to be and appear before the Judges of our Circuit Court of the Eleventh Judicial Circuit of the State of Florida, at the Court House in Miami on the 20 day of April A. D. 1944, at ten A. M., to testify in behalf of the State in a certain suit pending in said Court, wherein State of Florida is Plaintiff and The Brook Club, Inc., Defendant, and herein fail not under penalty of law.

Witness, the Honorable Paul D. Barns, Ross Williams, Richard H. Hunt, George E. Holt, Marshall C. Wiseheart, and Arthur Gomez, Judges, as also E. B. Leatherman, Clerk, and the Seal of said Court at the Court House in Miami, Florida, this 17 day of April A. D. 1944.

E. B. Leatherman, Clerk of the Circuit Court, by Wm. W. Stocking, Deputy Clerk.

Stanley Milledge, State Attorney.

Sheriff's Office

Filed Ap. 17, 1944, 11:50 A. M., Dade County, Florida.

(The following endorsement appears in pencil on the reverse side of Subpoena:)

[fol. 178] Served in person 4-17-44. 2 miles. 95.

D. C. Coleman, Sheriff of Dade County, Fla., by Geo. F. Holly, Deputy Sheriff.

On April 19th, A. D. 1944, Supreme Court Order Denying Petition For Writ Of Certiorari was filed, and on the 20th

day of April, A. D. 1944 was duly recorded in Chancery Order Book 687 on page 56, in the words and figures as follows, to-wit: [Caption omitted]

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs and the record having been inspected,

It Is Ordered that said Petition be and the same is hereby denied.

Supreme Court of the State of Florida. (Seal.)

A true copy Teste: Guyte P. McCord, Clerk, Supreme Court.

[fol. 179] On April 19th, A. D. 1944 Praecipe for Witness Subpoena was filed in the words and figures as follows, to-wit: [Caption omitted]

PRAECIPE FOR WITNESS SUBPOENA

The Clerk of the above named Court will please issue a witness subpoena in the above entitled cause directed to the following: Irene Dunne, May E. Potter, J. M. Battle returnable before the Judges of the above named Court at the Court House in Miami, Dade County, Florida, on the 20th day of April, A. D. 19—, at the hour of ten A. M. o'clock and oblige.

Stanley Milledge, State Attorney.

On April 26th, A. D. 1944 Witness Subpoena was filed in the words and figures as follows, to-wit:

Witness Subpoena—Civil

STATE OF FLORIDA,
County of Dade, ss:

IN THE NAME OF THE STATE OF FLORIDA

84054

[fol. 180] To All and Singular the Sheriffs of the State of Florida:

You are hereby requested to summon Irene Dunne, May E. Potter, J. M. Battle, all of them listed as being at Florida National Bank Building, as of 12/8/38, personally

to be and appear before the Judges of our Circuit Court of the Eleventh Judicial Circuit of the State of Florida, at the Court House in Miami on the 20th day of April, A. D. 1944, at 10 A. M., to testify in behalf of the State in a certain suit pending in said Court, wherein State of Florida is Plaintiff, and The Brook Club, Inc., et al. are Defendants, and herein fail not under penalty of Law.

Witness, the Honorable George E. Holt, Judges, as also E. B. Leatherman, Clerk, and the Seal of said Court at the Court House in Miami, Florida, this 19th day of April, A. D. 1944.

E. B. Leatherman, Clerk of the Circuit Court, by Wm. W. Stocking, Deputy Clerk.

Stanley Milledge, State Attorney.

(The following endorsement appears in pencil on the reverse side of the Subpoena.)

Served Potter, Dunne 4-20-44 2 miles, Battle in the Army.

1.06
.50
.25
.30

2.10

Sheriff of — County, Fla., by Tolbert, Deputy Sheriff.

[fol. 181] On April 26th, A. D. 1944 Affidavit of Mailing was filed in the words and figures as follows, to-wit:

[Caption omitted]

AFFIDAVIT OF MAILING

STATE OF FLORIDA,
County of Dade:

On this day personally appeared before me, the undersigned authority, Annabel Ebright, who being by me first duly sworn deposes and says that she is employed in the office of Stanley Milledge, State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County; that

on the 26th day of April, A. D. 1944 she served a true and exact copy of the restraining order entered in the above styled cause signed by Honorable George E. Holt, Circuit Judge, dated April 25, 1944, upon Ernest E. Roberts and Vincent C. Giblin, attorneys for the defendants herein, by placing said copy in an envelope directed to Ernest E. Roberts and Vincent C. Giblin, Attorneys at Law, Ingraham Building, Miami, Florida, and placing on said envelope sufficient uncancelled United States postage to carry same to its destination.

Anabel Ebright.

Sworn to and subscribed before me, at Miami, Florida, this 26th day of April, A. D. 1944. Rhona Mixon, Notary Public, State of Florida at Large. My Commission expires: 4-3-48. (N. P. Seal.)

[fol. 182] On April 26th, A. D. 1944 an Order was filed and on the 27th day of April, A. D. 1944 was duly recorded in Chancery Order Book 687 on Page 417, in the words and figures as follows, to-wit:

[Caption omitted]

ORDER

The above-styled cause came on to be heard this day upon the application of the plaintiff for a temporary restraining order, and the Court having considered the evidence submitted by the Plaintiff, none having been offered by the defendants hereinafter named, and having heard argument of counsel for the respective parties;

It Is Ordered, Adjudged and Decreed that until the further order of this Court the defendants The Brook Club, Inc., a corporation, Harry McLeod and William Maher are enjoined and restrained from conducting, maintaining, or operating on the premises described in the bill of complaint, known as the Brook Club, any game of roulette, craps, chemin-de-fer, or other unlawful game of chance, and from placing or maintaining on said premises any equipment, apparatus or facilities designed and intended for use in operation of or engaging in any unlawful game of chance, and that the said defendants be temporarily enjoined and restrained as aforesaid from so doing, directly or indirectly,

by any person, persons, firm, corporation, means, device or [fol. 183] agency, or by any agents, servants or employees.

Done and Ordered in Chambers at Miami, Dade County, Florida, this 25th day of April, A. D. 1944.

George E. Holt, Circuit Judge.

On May 1st, A. D. 1944 Defendants' Answer was filed in the words and figures as follows, to-wit:

[Caption omitted]

DEFENDANTS' ANSWER

Answering the bill of complaint herein, the defendants jointly and severally say:

1. The defendants deny, and say it is not true, that at the time of the institution of this suit, or for some time prior to the institution of this suit, or at any time since the institution of this suit, there was conducted or maintained in the building or on the premises mentioned and referred to in the bill of complaint a public nuisance of the nature and character set forth in the said bill, or a public nuisance of any nature or character.

2. The defendants say that the building mentioned and referred to in the bill of complaint is located on lots 1, 2, [fol. 184] 3, 4, 5 and 6 and lots 28, 29 and 30 of block 5 of Altos Del Mar No. 6, the subdivision mentioned and referred to in the bill. The defendants deny and say it is not true, that the building and the premises mentioned and described in the bill were maintained, at the time of the institution of this suit, or at any other time, primarily for the purpose of maintaining and operating an unlawful gambling house. The defendants say that such property is not now and has never been maintained primarily as or for an unlawful gaming house, but that, on the contrary, the building mentioned and referred to in the bill has been occupied and used primarily for the purpose of operating and maintaining therein a highclass exclusive restaurant, a dancing and entertainment salon and a bar, and that such purpose has at all times been the dominant and principal purpose for which the said building has been used. The individual defendants, as lessees, in the operation of their business, adopted and have employed a "club" plan for the purpose of enabling them to exclude from the said restaurant and

bar and other facilities undesirable and objectionable persons; and, as a result of the adoption and use of such plan, its patrons and guests have been and are only persons of good repute.

3. The individual defendants, as lessees, operated the said restaurant, dancing and entertainment salon and bar for a considerable period of time during the winter season of 1943-1944. Such business was conducted from approximately January 1, 1944 until April 1, 1944. The defendants admit that during such period, at the special instance and request of certain of the patrons of The Brook Club, a [fol. 185] certain room on the south side or wing of the said building was opened for gaming purposes for the pleasure and diversion of such patrons, but that no gambling was conducted in the said room or wing, or elsewhere in the said building, except on two widely separated dates during the said period of the club's operation. On such two occasions the games of chance were not open to the public, but only to a limited number of the patrons of the club. The defendants deny, and say it is not true, that the establishment is a well known gambling house. They deny, and say it is not true, that it is a matter of common knowledge that such establishment is a gambling house. They deny, and say it is not true, that such establishment, is reputed to be an unlawful gambling house. They deny, and say it is not true, that the defendants, or any of them, "from and after about January 13, 1944" to the date of the institution of this suit, continuously conducted and maintained the property mentioned and described in the bill of complaint as a gambling house in defiance of the laws of the State of Florida. The defendants reiterate their previous averment that only on two occasions during the months of January, February and March, 1944 were any games of chance conducted on the mentioned premises. One of such occasions was, as indicated in the bill of complaint, March 18, 1944. The defendants deny, and say it is not true, that the operation of The Brook Club constitutes, or has constituted, an unlawful public nuisance or that such operation tends, or has tended, to bring Dade County or the communities within such county into national disrepute. The Brook Club is not in a populous neighborhood. No private person has made complaint of any injury sustained or likely to be sustained [fol. 186] by himself or his property by reason of the

operation of such club. The Sheriff and other law enforcement officials of Dade County, Florida have not refused to perform or discharge their duties in the enforcement of the laws against gambling *and gambling* and the laws forbidding the creation and maintenance of public nuisances; and the ordinary legal methods and means are effective in compelling obedience to such laws. Therefore, no necessity exists for invoking the aid of a court of equity in this suit.

4. The defendants deny, and say it is not true, that, unless restrained by this Court, the defendants, or any of them, will maintain any public nuisance on the premises mentioned and described in the bill of complaint.

Vincent C. Giblin, Solicitor for Defendants.

On August 14th, A. D. 1944 Motion for Decree on Pleadings was filed in the words and figures as follows, to-wit:

[Caption omitted]

MOTION FOR DECREE ON PLEADINGS

The defendants, The Brook Club, Inc., a corporation, Harry McLeod and William Maher, jointly and severally [fol. 187] move the Court for the entry herein of a final decree on the pleadings.

The defendant-movants, as grounds for their motion, represent and show to the Court (a) that the bill of complaint was filed herein and the cause instituted on March 22, 1944; (b) that the defendants (after their joint and several motion to dismiss the bill of complaint had been denied) filed their joint and several answer to the bill of complaint on May 1, 1944; (c) that no counterclaim was filed herein by the plaintiff or relator; (d) that, therefore (by virtue of the provisions of Section 63.39 of the Florida Statutes of 1941), the cause has been at issue since May 11, 1944; (e) that the cause has not been set for trial before the Court; (f) that no order fixing the time within which the testimony of the parties should be taken has been entered; (g) that no testimony has been taken and no proofs have been submitted during the time which has elapsed since the cause came to issue; (h) that more than three months have elapsed since

the cause came to issue; (i) that the time for the taking of testimony has not been extended by order of the Court or by the written or oral stipulation of the parties; (j) that no motion or application for the entry of an order extending the time for the taking of testimony has been filed by the plaintiff or relator or by any of the defendants; (k) that no proper or sufficient reason or cause has been or can be assigned by the plaintiff for an extension of time for the taking of testimony; and (l) that, therefore (by virtue of [fol. 188] the provisions of Section 63-46 of the Florida Statutes of 1941), the time for the taking of testimony having expired, the defendants, and each of them, are entitled to the entry herein of a final decree on the pleadings.

August 14, 1944.

Ernest E. Roberts, Vincent C. Giblin, Solicitors for Defendants, by Vincent C. Giblin, Of Counsel.

On October 24th, A. D. 1944 Notice was filed in the words and figures as follows, to-wit:

[Caption omitted]

NOTICE

To The Honorable Stanley Milledge, the State Attorney, of and for the Eleventh Judicial Circuit of Florida and the relator in the above entitled cause;

You will please take notice that on Tuesday, October 31, 1944, at two o'clock in the afternoon of the said day, or as soon thereafter as counsel may be heard, the defendants in the above entitled cause, by and through their undersigned solicitors, will call up for argument and disposition before the Honorable Marshall C. Wisecheart, [fol. 189] one of the Judges of the above styled Court, in his chambers in the Court House of Dade County, Florida, at Miami, the said defendants' motion (filed in the said cause on August 14, 1944) for the entry in the said cause of a final decree on the pleadings.

October 24, 1944.

Ernest E. Roberts, Vincent C. Giblin, Solicitors for Defendants, by Vincent C. Giblin, Of Counsel.

The receipt by the undersigned on October 24, 1944 of a true and correct copy of the above and foregoing notice is hereby acknowledged.

October 24, 1944.

Stanley Milledge, State Attorney of and for the Eleventh Judicial Circuit of Florida and the Relator in the Entitled Cause.

[fol. 190] On October 31st, A. D. 1944 Final Decree was filed and on the 1st day of November, A. D. 1944 was duly recorded in Chancery Order Book 704, on page 251, in the words and figures as follows, to-wit:

[Caption omitted]

FINAL DECREE ON PLEADINGS

This cause was today heard, after due notice, on the motion (filed herein on August 14, 1944) of the defendants for the entry of a final decree on the pleadings. The Court has duly considered the matter and is fully advised in the premises.

It is accordingly Ordered, Adjudged and Decreed that the said motion be, and it hereby is, granted; and that the bill of complaint (filed herein on March 22, 1944) be, and it hereby is, dismissed.

Done And Ordered in Chambers at and in the City of Miami, Dade County, Florida, October 31, 1944.

Marshall C. Wiseheart, Circuit Judge.

[fol. 191] STATE OF FLORIDA,
County of Dade, ss:

I, E. B. Leatherman, Clerk of the Circuit Court, in and for the County of Dade, State of Florida, Do Hereby Certify that the foregoing pages numbered from one to 42, inclusive, contain a correct transcript of the record of the Judgment in the case of State Of Florida, Ex Rel.: Stanley Milledge, as State Attorney for the Eleventh Judicial Circuit of Florida, plaintiff, against The Brook Club, Inc., et al., Defendants, and a true and correct recital and

copy of all such papers and proceedings in said cause, as appears from the records and files of my office.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said Circuit Court on this the 21 day of November, A. D. 1944.

E. B. Leatherman, Clerk of the Circuit Court, by L. G. Woodard, Deputy Clerk. (Circuit Court Seal.)

[fol. 192] IN THE CIRCUIT COURT IN AND FOR THE COUNTY OF DADE

ORDER ALLOWING ATTORNEYS TO APPEAR AS AMICI CURIAE—December 8, 1944

This matter coming on before this Court on November 28, 1944, and it having been made to appear that the Honorable F. M. Hudson, James M. Carson and M. L. Mershon, all of the Miami bar, have, at the request of the Committee on Courts and the Committee on Public Relations of the Dade County Bar Association, sought leave to appear herein as amici curiae;

It Is Thereupon Ordered And Adjudged that the said attorneys be and they are hereby granted leave and permission to present their views as amici curiae.

Done And Ordered on this the 6th day of December, 1944, as of and for the 28th day of November, 1944.

Marshall C. Wiseheart, Paul D. Barns, Circuit Judges.

[fol. 193] IN THE CIRCUIT COURT IN AND FOR THE COUNTY OF DADE

ORDER DENYING MOTION TO QUASH CITATION—December 9, 1944

This cause came on to be heard upon motion to quash the citation heretofore issued in this case.

To begin with it should be noted:

1. That the initial statement at the opening of the hearing herein on November 28 was that the citing judges offered to retire if the respondents would suggest it and believed

they might receive a more fair trial from another judge. Respondents replied that they had no suggestion to make:

2. That the respondents have been cited on a charge of making an unfair and untrue report of court proceedings. and in turn of making false imputations against the court and its judges as such based upon respondents' own unfair and untrue report.

The rule was issued by the Court itself and was not based upon any information filed by the state attorney, for the reason that the Court was criticized in and by the editorial and cartoon attached to the rule for deciding the cases upon questions of law adversely to the contentions of the state attorney. Since the respondents admit the publications this dissipates the procedural objection relating to the means [fol. 194] by which these proceedings were initiated.

The procedure adopted, however, has been recognized and employed by the Supreme Court of Florida.

In Re Hayes, 72 Fla. 558, 73 So. 362, L. R. A. 1917 D, 192, Ann. Cas. 1918, p. 936, 387, Vol. 3.

From the opinion of the Supreme Court of Florida in the Hayes case, we quote the following part:

"Publishers of newspapers have the right, but no higher right than others, to bring to public notice the conduct of the courts, provided the publications are true and fair in spirit. The liberty of the press secures the privilege of discussing in a decent and temperate manner, the decisions and judgments of a court of justice, but the language should be that of fair and honorable criticism, and should not go to the extent of assigning to any party or the court false or dishonest motives. There is no law to restrain or punish the freest expressions of the disapprobation that any person may entertain of what is done in or by the courts. Under the right of freedom of speech and of the press the public have a right to know and discuss all judicial proceedings, *but this does not include the right to attempt, by wanton defamation, groundless charges of unfairness and stubborn partisanship to degrade the tribunal and impair its efficiency.* 6 R. C. L. pages 254-512. 'The liberty of the press is subordinate to the independence of the judiciary, and it is not expedient

that any class in the community should be privileged to attack the courts with the view to interfere with the [fol. 195] rights of litigants or to embarrass the administration of justice. Liberty of the press must not be confounded with license or abuse of that liberty.' 6 R. C. L. p. 510. Our statute provides that 'every court shall have power to punish contempts against it,' etc. • • •

"The conduct of unprincipled men, traducing the institutions of a state to the end that their political ambitions may be realized, is an unsafe guide for the young man who desires to succeed in the honored field of journalism, and is an example too degrading to be imitated and too vicious to be condoned by the self-respecting journalist. He cannot fan the flames of suspicion and distrust by printing a false article, relating to a cause then pending in court, and imputing to that court a lack of integrity, without violating the law and transgressing every conception of decency. Newspaper editors and reporters have the rights to publish the proceedings of the courts, including the pleadings, proofs, and remarks of the court and counsel, yet they must see to it that they *publish them truthfully and correctly.* But they have no right to give publication to the impressions made by such court proceedings upon *their minds,* by the use with reference to the court itself of such contemptuous and opprobrious adjectives as [fol. 196] that the court was 'partisan,' 'stubborn,' 'hostile to counsel,' and 'ignorant.'" (Emphasis added.)

Hayes was held in contempt of ths Supreme Court for false newspaper comment directed against that court.

Clear and Present Danger

Most of the argument of the defendants was based upon the decision of the Supreme Court of the United States in 1941, in the case of Bridges vs. California, 314 U. S. 252-305, 62 Sup. Ct. Rep. 190, 86 Law Ed. 192.

At the outset of his opinion Mr. Justice Black drew attention to the fact that the California statutes did not provide for punishment for contempt. Further, the language used by the newspaper in the case of Bridges vs.

California did not attempt to impute to the Court any improper, malicious or corrupt motive.

Heretofore the standard fixed for contempt has been that of the "tendency of the act to impede, interfere with or frustrate a fair administration of justice."

Much ado seems to be made about the "clear and present danger" qualifications announced in the Bridges case. It does not appear to us that the qualification of "tendency" by the Bridges case is as far reaching as counsel would lead us to believe. The cases on contempt show that the courts have usually applied the law of contempt as announced in the Bridges case even though the phrase "clear and present danger" may be new.

Tendency, like negligence, is not a thing—it is relative. The circumstances determine whether the act presents a clear and present danger tending to interfere with and [fol. 197] impede or frustrate a fair administration of justice. The moral character or stability or resistance of the particular judge involved might be a circumstance, but not necessarily the deciding factor.

Public Policy—Statutory Declarations

The Hayes case, above cited, points out, however, that power to punish for contempt existed at Common Law. From the beginning we have had in Florida a statute which makes the English Common Law the law of Florida, which statute reads as follows:

> "The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state."
>
> 1941 Florida Statutes, Sec. 2.01.

Besides that general statute, we have specific statutes, some conferring and some recognizing the right of courts to punish for contempt. Sec. 38.22 and 38.23 of the Florida Statutes of 1941 read as follows:

> "Every court may punish contempts against it, but the punishment imposed by a justice of the peace shall

not exceed twenty dollars fine or twenty-four hours imprisonment."

"A refusal to obey any legal order, mandate or de-
[fol. 198] cree, made or given by any judge either in term time or in vacation relative to any of the business of said court, after due notice thereof, shall be considered a contempt, and punished accordingly. But nothing said or written, or published, in vacation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt."

It will be noticed that by these two sections there are two limitations imposed upon the power of courts to punish for contempt.

The first section limits the penalty that may be imposed by Justices of the Peace; the second section limits the power of courts to punish by contempt proceedings for anything said or written, or published, *in vacation*, to or of any judge, or of any decision made by a judge. This recognizes the power to punish for such contempts if committed in term time.

In addition to these statutes there is a specific statute, contained in the criminal procedure provisions, conferring jurisdiction to punish for contempt, just as in the exercise of civil jurisdiction, and providing that criminal courts of record shall have the same power in this respect as circuit courts.

"said courts, in the exercise of their criminal jurisdiction, may punish for contempts as in the exercise of their civil jurisdiction, and the criminal courts of record shall possess, in this respect, the same powers as the circuit courts."

1941 Florida Statutes, Sec. 932.03.

[fol. 199] *Cases Pending—When.*

For purposes of contempt:

"Proceedings are pending immediately the writ is issued, and as long as any proceedings can be taken; and it is usually necessary to constitute the offence of contempt that the comments complained of should appear during such pendency."

Oswald's Contempt of Court, p. 97.

"A cause is pending within the rule of contempt concerning libelous publications when it is still open for modification or rehearing."

In Re Nelson, 60 Pac. (2nd) 365. See also Providence Journal Co., 68 Atl. 428.

But as expressed by Judge Hand in Ex Parte Craig, 282 Fed. (text) 159, "the rule does not depend on formalities." This point was treated in 48 Harvard Law Review 886 (text) 890 which reads:

"There was some question for a time whether it was contempt to comment on a case after a person has been charged before the magistrate but before he had been committed for trial. In Rex vs. Parke the court had no hesitation in holding that it was, Wills, J., saying:

'It is true that in very nearly all the cases which have arisen there has been a cause actually begun, so that the expression, quite natural under the circumstances, accentuates the facts, not that the case has been begun, but that it is not at an end. That [fol. 200] is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow.'"

Freedom of the Press

The constitutional guarantee of freedom of the press must in the final analysis depend upon the courts of the land for its protection.

If the power claimed by the press under the constitutional provisions should be so far abused as to degrade the courts and to impair their efficiency and their ability or willingness to enforce constitutional rights, where then could the press, itself, look for its protection?

We have freedom of the press and freedom of speech expressly provided for in our constitutions and it has not been found necessary to expressly provide in them for "freedom of government." If the press has a social obligation it is at least no greater than that of the courts.

By freedom of the press is meant that books and newspapers may be published without leave of any governmental authority. It has not always been so. It does not

carry with it immunity to restraints for abuses of the privilege.

> *Freedom of the press is the liberty to print and publish without any previous leave of governmental authority, subject always to the consequences of the law.*
>
> "The inherent power of the courts to punish any publication calculated to interfere with the administration of justice is not restricted by the constitutional guar- [fol. 201] anties of liberty of the press, for liberty of the press is subordinate to the independence of the judiciary and the proper administration of justice. Liberty of the press must not be confounded with license or abuse of that liberty.
>
> 12 Am. Jur. 413.

In consideration of the premises, it is thereupon: Ordered and Adjudged that the said motion to quash be and the same is hereby denied.

Done and Ordered this 9th day of December, 1944.

Paul D. Barns, Marshall C. Wisecheart, Circuit Judges.

[fol. 202] In the Circuit Court In and For the County of Dade

Findings of Fact—December 15, 1944

(From the records of the ten cases referred to in the editorials and cartoon.)

The Court makes the following findings of fact from the Court's records and the Clerk's Minutes relative to those certain cases referred to in the citation heretofore issued herein, with the notation of the specific (and not the general) editorial comments relative to each case, and for purposes of convenience the photostatic copy of the Clerk's Minutes is attached and filed herewith.

"A"

State of Florida vs. Eight Defendants, in Cases Numbered 847, 850, 851, 855 and 856 Charged with Rape

Facts

The facts as reflected by the clerk's court records in and relating to said cause against defendants Dienger and Muir (#856) are that the defendants' attorney on October 30, 1944, filed a motion grounded on a complaint that "due to a mistake of the scrievenor, the indictment omits to charge that the defendant 'did feloniously ravish and carnally know' any particular female" and Assistant State Attorney Henry M. Jones representing "public interest" agreed in open court that the motion should be sustained and that he would want to overcome the defect in that indictment and [fol. 203] the same defect in the indictments against the other six defendants, all of which appears from the public records in said cases and the Clerk's Minutes of October 30, 1944, and as was witnessed by members of the press and bar then in attendance; said minutes in part reading as follows:

> "Counsel for the Defendants Dienger and Muir filed a motion to quash the above Indictment. The Court in pursuance of said motion and with the approval of the Assistant State Attorney, ordered said Indictment quashed and the Defendant remanded to the custody of the Bailiff.
>
> "Upon recommendation of the assistant State Attorney, the Court ordered the Indictments quashed in the following cases:
>
> State of Florida vs. John Kirby King, #847; State of Florida vs. Joseph Fulcher, #851; State of Florida vs. LeRoy La Fleur, also known as 'Buster La Fluer', #850; State of Florida vs. Robert Hubert, Willie D. Jerry, also known as 'Willie Williams', #855." Recorded in Book 146, page 271, Clerk's Minutes.

On the next day (within 24 hours) new indictments were returned against all eight defendants and their cases, on the same day, promptly set for trial as will appear by the court records and the Clerk's Minutes of October 31, 1944, hereto attached.

[fol. 204] *Editorial*

Instead of basing the editorial comment upon a fair or full report to the people upon such public proceedings, its semi-factual report is restricted to merely stating that:

> "Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn. Back they went to the Grand Jury for re-presentation to the Court."

and with said editorial published the cartoon showing the "Defendant dismissed" and the public not being heard—when in truth and fact the public was heard through its assistant state attorney, who agreed that the action was proper.

The respondents did not report to the public that within twenty-four hours after the indictment against eight defendants were found defective by the assistant state attorney, defendants' attorney and the circuit judge and has been corrected by a grand jury, the prisoners had been arraigned by the Court and their cases set for trial by the Court; but instead respondents withheld all these facts except as above set forth.

"B"

The Brook Club Case

Chancery #84054

Facts

The facts reflected by the clerk's court records are that the Brook Club was instituted by the state attorney on March 22, 1944, and he procured from Judge Holt (although the case was filed in Judge Barns's division) a temporary restraining order therein on April 26, 1944. Thereafter the defendants filed their answer to the complaint on May 1, [fol. 205] 1944. Under the law the case was ready for trial (came at issue) on May 11, 1944, but it was never further prosecuted by the state attorney as was his privilege if he deemed it advisable.

On August 14, 1944, the defendant filed a motion for decree on pleadings and on October 24 the state attorney was notified of the hearing set for October 31, 1944, and the state attorney was notified of the hearing set for October 31, 1944, and the state attorney not making any motion for con-

tinuance or postponement of the hearing, Judge Wiseheart dismissed the case on the latter day.

Editorial

Notwithstanding the foregoing public proceedings, the semifactual report for editorial comment is merely that:

> "A padlock action against the Brook Club was initiated last spring before Judge George E. Holt who granted a temporary injunction. After five months, the case appeared Tuesday out of blue sky before Judge Marshall C. Wiseheart at the time State Attorney Milledge was engaged with the Grand Jury."

Notwithstanding that the defense filed its motion for a decree for want of prosecution on August 14, 1944 (after a lapse of 95 days) and not withstanding that the defense brought same on for hearing after a week's notice and after a lapse of 173 days since it came at issue and ready for prosecution by the state attorney's office, the report for editorial comment was that:

> "The judge dismissed the injunction against the club and its operators. The defense got delay when it [fol. 206] wanted and prompt decision from the court when it profited it."

"C"

Lipop-Teepee Club Case

Chancery #87365

According to the clerk's court records on September 23, 1944, this case was instituted by the state attorney to enjoin use of certain premises for gambling. On October 12, 1944, Judge Holt denied plaintiff's petition for a temporary injunction and in his order refused to give credence to five affidavits and the order entered included the language quoted in the editorial.

No further prosecution has been effected.

Paul D. Barns, Marshall C. Wiseheart, Circuit Judges.

[fol. 207] October 30th, A. D. 1944

Criminal Division of the Circuit Court opened 2:00 o'clock P. M. All officers present. Honorable Paul D. Barns, presiding; F. J. Gould, Deputy Clerk.

No. 856

STATE OF FLORIDA

vs.

NEWTON REID BLACK, THEODORE ROBERT DIENGER, JOHN REMER MUIR

Defendants in person present in open Court.

Counsel for the Defendants Deinger and Muir filed a motion to quash the above Indictment. The Court in pursuance of said motion and with the approval of the Assistant State Attorney, ordered said Indictment quashed and the Defendant remanded to the custody of the Bailiff.

Upon recommendation of the Assistant State Attorney, the Court ordered the Indictments quashed in the following cases:

No. 847

STATE OF FLORIDA

vs.

JOHN KIRBY KING

No. 851

STATE OF FLORIDA

vs.

JOSEPH FULCHER

No. 849

STATE OF FLORIDA

vs.

VANCE DIXON

No. 850

STATE OF FLORIDA

vs.

LEROY LA FLEUR, also Known as "Buster La Fleur"

No. 855

STATE OF FLORIDA

vs.

ROBERT HUBERT, WILLIE D. JERRY, also Known as "Willie Williams"

Defendant by counsel present in open Court.

[fol. 208] Defendant by his counsel waived arraignment and entered Plea of "Not Guilty."

Court set November 27th, 1944 as trial date of above cause.

No. 852

STATE OF FLORIDA

vs.

WILLIE WESTON

Defendant in person and with counsel present in open Court. Defendant waived arraignment and entered plea of "Not Guilty." Court set December 11th, 1944 as trial date of above cause. Court ordered the Defendant remanded to the custody of the Sheriff.

No. 853

STATE OF FLORIDA

vs.

THOMAS HARRIS

Defendant in person present in open Court. Defendant was arraigned and entered his plea of "Not Guilty." Court appointed Attorney Ben Hendricks to represent the Defendant.

Court set November 29th, 1944 as trial date of the above cause.

Court ordered the Defendant remanded to the custody of the Sheriff.

No. 854

STATE OF FLORIDA

vs.

JOHN L. WIGGINS

[fol. 209] Court set December 4th, 1944 as trial date of the above cause.

No. 857

STATE OF FLORIDA

vs.

LILLIAN G. FREAR

Defendant in person and with counsel present in open Court.

Defendant waived arraignment and entered plea of "Not Guilty."

Court set November 20th, 1944 as trial date of the above cause.

Court ordered the Defendant remanded to the custody of the Sheriff.

No. 859

STATE OF FLORIDA

vs.

ROY T. RUDEEN

Defendant in person and with counsel present in open Court. Defendant waived arraignment and entered plea of "Not Guilty." Court set December 6th, 1944 as trial date of the above cause.

Court ordered the Defendant remanded to the custody of the Sheriff.

Court recessed from Day to Day.

October 31st, A. D. 1944

Criminal Division of the Circuit Court opened 2:00 o'clock [fol. 210] P. M. All officers present. Honorable Paul D. Barns, presiding; F. J. Gould, Deputy Clerk; L. G. Woodard, Deputy Clerk.

The Grand Jury returned into Court. All were present, except Dudley B. Hartman.

They returned an Indictment against Delmer Butler for Rape. Court ordered the Indictment filed, Capias issued, and the Defendant held in custody without Bond until the further order of the Court.

They returned an Indictment against John Kirby King for Rape. Court ordered the Indictment filed, Capias issued and case set for trial November 15th, 1944.

They returned an Indictment against LeRoy LaFleur, also known as "Buster LaFleur" for Rape, Court ordered the Indictment filed, Capias issued and the Defendant held in custody without Bond until the further Order of the Court.

They returned an Indictment against Joseph Fulcher for Rape. Court ordered Indictment filed, Capias issued and the Defendant held in custody without Bond until the further order of the Court.

They returned an Indictment against Robert Hubert and Willie D. Jerry, also known as Willie Williams, for Rape. Court ordered the Indictment filed capias issued and the Defendants held in custody without Bond until the further order of the Court.

They returned an Indictment against Newton Reid Black, Theodore Robert Dienger, and John Remer Muir for Rape. [fol. 211] Court ordered Indictment filed, Capias issued and the Defendants held in custody without Bond until the further Order of the Court.

The Grand Jury having no further business to present retired from the Court room.

No. 855

STATE OF FLORIDA

vs.

ROBERT HUBERT, WILLIE D. JERRY, Also Known as "WILLIE WILLIAMS"

Defendants in person and with counsel present in open court. The Defendants were arraigned and entered Plea of "Not Guilty". Court set November 13th, 1944 as trial date of the above cause.

Court ordered the Defendants remanded to the custody of the Sheriff.

No. 847

STATE OF FLORIDA

vs.

JOHN KIRBY KING

Defendant by counsel present in open court.

Court set November 15th, 1944 as trial date of the above cause.

No. 856

STATE OF FLORIDA

vs.

NEWTON REID BLACK, THEODORE ROBERT DIENGER, JOHN REMER MUIR

Defendants in person present in open Court. Counsel for Defendants Theodore Robert Dienger and John Remer [fol. 212] Muir presented motion for Severance as to the Defendants above named, which was granted to the Court.

Thereupon the Defendants Theodore Robert Dienger and John Remer Muir waived arraignment and each entered plea of "Not Guilty".

Court set December 13th, 1944, as trial date of above cause.

Court ordered the Defendants remanded to the custody of the Sheriff.

Defendant Newton Reid Black in person present in open Court.

Court appointed Attorney Geo, Okell to represent the Defendant.

Defendant was arraigned and entered plea of "Not Guilty".

Court set December 20th, 1944 as trial date of above cause.

Court ordered the Defendant remanded to the custody of the Sheriff.

No. 850

STATE OF FLORIDA

vs.

LEROY LAFLEUR, Also Known as "Buster LaFleur"

Defendant in person and with counsel present in open Court.

Defendant was arraigned and entered Plea of "Not Guilty."

Court set December 18th as trial date of the above cause.

Court ordered the Defendant remanded to the custody of the Sheriff.

No. 851

STATE OF FLORIDA

vs.

JOSEPH FULCHER

Defendant in person and with counsel present in open Court.

[fol. 213] Defendant was arraigned and entered plea of "Not Guilty".

Court set January 8th, 1945 as trial date of the above cause.

Court ordered the Defendant remanded to the custody of the Sheriff.

No. 860

STATE OF FLORIDA

vs.

DELMER BUTLER

Defendant in person present in open Court.

Court appointed attorney Geo. Okell to represent the Defendant.

Defendant was arraigned and entered his plea of "Not Guilty."

Court set January 10th, 1945 as trial date of the above cause.

Court ordered the Defendant remanded to the custody of the Sheriff.

Court recessed from Day to Day.

[fol. 214] IN THE CIRCUIT COURT IN AND FOR THE COUNTY OF DADE

JUDGMENT OF GUILT IN CONTEMPT—December 18, 1944

This cause is ready for a final adjudication upon the original citation issued by the Court, the answer of the respondents, and the records in the ten cases identified in the citation, of which records the Court's "Findings of Facts" is a synopsis.

Answer of Respondents

In dealing with the respondents' sixty pages of answer we make the following observations:

1. The allegations of the answer inconsistent with the Court's records must be taken to be conclusively disproved by the records of the Court.

2. Since the meaning and import of the editorials and cartoon are unambiguous, the allegations of the answer which attempt to deny the plain meaning of the cartoon and the words used in the editorials must be ignored.

3. The subsequent Grand Jury report can not avail the respondents anything since it is in nowise related to the subject-matter of the editorial and cartoon; to-wit, judicial acts, and also because the report was made many days after the publication of the editorials.

4. The affidavit of John D. Pennekamp can be of no avail [fol. 215] since it in nowise excuses the unfair and untrue charges and imputations of the editorials and cartoon.

5. The affidavit of Jeane Bellamy Bills (The Herald's employee) is of no avail since it is only a newspaper reporter's views of the law and likewise her view of some of the facts revealed by the Court's records. The records themselves will control.

The respondents' answer in effect submits that their publications directed at specific judicial actions were prompted by the faults of the law and by the alleged failure or neglect of the law enforcement officers—the prosecuting and arresting officers—a libel of the Court for the faults of others.

Comment

A false statement without the support of some truth may be met and dealt with but a half truth even gives credence to the false. A newspaper, like an individual, does not have the right to falsify.*

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* Mr. Elisha Hanson, of counsel for The Herald, at the termination of his argument upon the return to the citation, and in answer to hypothetical questions from the bench, stated as follows:

"Mr. Hanson: * * * under this doctrine a newspaper can go to the extreme of saying what it wants

The public depend upon newspapers for information and the public has a right to assume that a newspaper will fairly report the proceedings of the courts—the people's own institutions. Correct information will remedy evils but misinformation and regimented news may likely destroy the good.

The People's Reliance on Newspapers

The public has come to depend upon reputable newspapers for information and a false report by a reputable news- [fol. 217] paper is accepted as true and the people are deceived. The Miami Herald is considered a reputable newspaper. It has a large circulation of over 125,000 daily on week days. With increased circulation comes greater responsibilities.

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to say about judicial proceedings, and I regret to say that when it is given that right, it is also given the right of being unfair if it wants to be, but I don't know of any newspaper that wants to be unfair.

[fol. 216] Judge Barns: You say it has the right to lie about it?

Mr. Hanson: Yes, and if it lies about the Court the individual judge who is lied about has the right of suing for libel.

* * * * * * *

Judge Barns: Do you confent that the freedom of the press carries with it the right to lie?

Mr. Hanson: The Courts have so held, and they could hold no other thing if you can have the freedom of speech and freedom of press; it does carry the right to lie, and then the Courts have said the one who is lied about has his remedy in some form of subsequent punishment rather than through some from of restraint.

* * * * * * *

Judge Barns: But speaking of the Court as an institution, you have a right to lie about it without there beng any punishment, wouldn't you, under that?

Mr. Hanson: Just the same as you have the right to tell the truth about it without any punishment, if the truth hurt."

The people have a right to not be misinformed and deceived concerning their courts. Courts are for the people and they, the people, are entitled to a fair report concerning court actions. To report on court proceedings is a voluntary undertaking but when undertaken the publisher who fails to fairly report does so at his own peril.

Punishment

Is it exacting too much of the press to require of it that, when it seeks to impugn judicial acts that it not make untrue and unfair reports as a basis for its attack? We think not.

This is a case wherein the appropriate punishment is difficult. We feel that the penalties hereinafter imposed are fairly nominal considering the facts.

We find the facts recited and the charges made in the citation to be true and well founded; wherefore,

It Is Ordered and Adjudged that:

1. John D. Pennekamp and The Miami Herald Publishing Co., and each of them, are and stand guilty of contempt of the Circuit Court of the Eleventh Judicial Circuit of Florida for making an unfair and untrue report of court proceedings and in turn of making false imputations against the Court and its Judges as such based upon respondents' own [fol. 218] unfair and untrue report as appears more fully from the citation and the Court's records;

2. That John D. Pennekamp be and he is hereby fined the sum of $250.00;

3. That The Miami Herald Publishing Co. be and it is hereby fined the sum of $1000.00;

4. That upon the payment of same said sum shall be paid into the Fine and Forfeiture Fund of Dade County, and in default of payment that an execution or executions issue after the time limitation set forth in the next paragraph;

5. That no execution shall issue herein for thirty days or so long as any petition for review shall be pending and not finally disposed of.

Done and Ordered this December 18th, 1944.

Paul D. Barns, Marshall C. Wiseheart, Circuit Judges.

[fol. 219] IN THE CIRCUIT COURT IN AND FOR THE COUNTY OF DADE

NOTICE OF APPEAL FROM JUDGMENT OF GUILT IN CONTEMPT—January 8, 1945

The defendants, John D. Pennekamp and The Miami Herald Publishing Co., a corporation, take and enter their appeal to the Supreme Court of Florida to review the order and judgment of the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, bearing date the 18th day of December, A. D. 1944, entered in the above styled cause and recorded in the records of said Court, in Min. Book 144 page 33, and all parties to said cause are called upon to take notice of the entry of this appeal.

Milam, McIlwaine & Milam, by E. T. McIlvaine, Edward E. Fleming, Attorneys for John D. Pennekamp and The Miami Herald Publishing Co.

The undersigned State Attorney for Dade County, Florida, hereby acknowledges receipt of a copy of the foregoing notice of appeal. This 8 day of January, A. D. 1945.

Stanley Milledge, State Attorney for Dade County, Florida; James M. Carson, F. M. Hudson and M. L. Mershon, by M. L. Mershon, Amicus Curiae.

[fol. 220] IN THE CIRCUIT COURT IN AND FOR THE COUNTY OF DADE

GROUNDS OF APPEAL AND ASSIGNMENT OF ERRORS—Filed January 8, 1945

Comes now the defendants and appellants, John D. Pennekamp and The Miami Herald Publishing Co., and for grounds of the appeal taken in the above entitled cause and for assignments of error, state as follows:

1. The rulings, decisions and orders of the trial court from which the appeal is taken are:

(a) The order of said court dated December 9, 1944, denying the motion to quash the rule in contempt; and

(b) The paper writing signed by said Judges, without date, entitled "Findings of Fact", filed in said Court on December 15, 1944; and

(c) The judgment of guilt in contempt, dated December 18, 1944.

And for assignment of the error relied upon by these defendants for a reversal of the aforementioned rulings, decisions and orders, these appellants assign the following:

A. As to the Order of December 9, 1944, denying the motion to quash the rule:

1. Failing to hold that the citation must allege and show a clear and present danger to obstruct and interfere with the administration of justice.

2. Holding that all allegations in the citation of a mere tendency to obstruct and interfere with the judges in fairly and impartially administering justice was sufficient to charge the crime of contempt.

3. Hold that the matters forming the basis of said [fol. 221] newspaper comment were still pending, whereas it appears that all comment was in reference to matters not then "being presented, heard or decided."

4. Holding that the common law test of freedom of the press in contempt cases will be applied in Florida.

5. Holding that the matters complained of were contemptuous.

B. As to the Findings of Fact:

6. Error in finding that the cartoon referred to the rape cases and that the figure "public interest" represented Asst. State Attorney Henry M. Jones.

7. Error in failing to give effect to respondents' disavowal in the return that the cartoon referred to the rape cases or was intended to illustrate the same.

8. Error in holding that failure to report the approval of Assistant State Attorney Jones of quashal of indictments, constituted a willful and grossly inaccurate statement of court action or that the same constituted contempt.

9. Error in holding that respondents failed to report the reindictment, re-arraignment and re-setting of the rape cases, in the absence of affidavits or evidence to establish such failure; or that such failure constituted a

grossly inaccurate statement of court action or constituted contempt.

C. As to the judgment of guilt in contempt:

10. Error in adjudging respondents guilty of contempt for making an unfair and untrue report and false [fol. 222] imputations against the court.

11. Error in assessing an excessive fine of $1000.00 against the Miami Herald Publishing Co.

12. Error in holding the editorials and cartoon to be unambiguous and that said publications were plainly impugning in nature.

13. Failure to give effect to the return of respondents as to the intent of said publications and factually assuming matters of impugning nature contrary to the said return and the unfair meaning of said publications.

Milam, McIlvaine & Milam, by E. T. McIlvaine, Edw. E. Fleming (Edward E. Fleming), Attorneys for John D. Pennekamp and The Miami Herald Publishing Co.

[fol. 223] IN THE CIRCUIT COURT IN AND FOR THE COUNTY OF DADE

DIRECTIONS TO THE CLERK FOR MAKING UP TRANSCRIPT ON APPEAL—Filed January 8, 1945

The Clerk of said Court is hereby directed to prepare a transcript of record on appeal in the above entitled cause in accordance with the rules of the Supreme Court of Florida.

You will make the following copies and recitals in said record:

1. Copy the citation for contempt.

2. Copy the return of the respondents filed November 28, 1944.

3. Copy the excerpt Transcript of Proceedings filed December 6, 1944, and Exhibits A and B filed at the trial of said cause.

4. Copy the order allowing attorneys to appear amici curiae filed December 8, 1944.

5. Copy the order dated December 9, 1944 denying the motion to quash citation.

6. Copy the findings of fact filed December 15, 1944.

7. Copy the judgment of guilt in contempt dated December 18, 1944.

8. Copy the notice of appeal from judgment of guilt in contempt, together with receipt of service.

9. Copy the grounds of appeal and assignments of error, [fol. 224] together with receipt of service.

10. Copy these directions to the Clerk for making up the transcript.

11. Attach a certificate to the transcript in accordance with the Supreme Court Rules.

12. Stipulation dated January 8, 1945.

Milam, McIlvaine & Milam, by E. T. McIlvaine, Edw. E. Fleming (Edward E. Fleming), Attorneys for Appellants.

Copy of the foregoing Directions to the Clerk received by me this 8th day of January, A. D. 1945.

Stanley Milledge, State Attorney for Dade County, Florida; James M. Carson, F. M. Hudson and M. L. Mershon, by M. L. Mershon, Amicus Curiae.

[fol. 225] IN THE CIRCUIT COURT IN AND FOR THE COUNTY OF DADE

STIPULATION AS TO RECORD—Filed January 8, 1945

It Is Hereby Stipulated by and between Stanley Milledge, State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida, and James M. Carson, F. M. Hudson and M. L. Mershon, Amicus Curiae, and Milam, McIlvaine & Milam and Edward E. Fleming, attorneys for the respondents, that the colloquy between Judge Barns and counsel for the respondents had at the time of the trial on November 28, 1944, the transcribed notes of which were filed herein on December 6, 1944, be made a part of and incorporated in the record herein.

Dated at Miami, Florida, this 8th day of January, 1945.

Stanley Milledge, State Attorney; James M. Carson, F. M. Hudson and M. L. Mershon, Amicus Curiae, by M. L. Mershon. Milam, McIlvaine & Milam and Edward E. Fleming, by Edw. E. Fleming, Attorneys for Respondents.

I do not assert a position that the State of Florida is a party to the above proceedings but I sign the stipulation merely to satisfy any technical requirement concerning the record, if such exists 1/8/45.

Stanley Milledge, State Attorney, 11th Circuit.

[fol. 226] [Caption omitted]

We hereby acknowledge receipt this 8th day of January, 1945, of a copy of the Grounds of Appeal and Assignments of Errors.

Stanley Milledge, State Attorney for Dade County, Florida. James M. Carson, F. M. Hudson and M. L. Mershon, by M. L. Mershon, Amicus Curiae.

[fols. 227-228] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 229] IN THE SUPREME COURT OF FLORIDA

In Re: JOHN D. PENNEKAMP and THE MIAMI HERALD PUBLISHING COMPANY, Petitioners

MOTION TO DISMISS APPEAL FROM JUDGMENT OF GUILT OF CONTEMPT—Filed January 31, 1945

Comes now J. Tom Watson, Attorney General of the State of Florida, and moves the court to dismiss the appeal heretofore taken in the above entitled cause, and for grounds of such motion, sets forth and shows as follows:

1. An appeal does not lie from an order of a court of general jurisdiction imposing punishment for contempt of court.

J. Tom Watson, Attorney General; George M. Powell, Assistant Attorney General.

[fols. 230-231] STATE OF FLORIDA,
County of Leon:

George M. Powell, being first duly sworn, deposes and says that he is one of the attorneys for the State of Florida

in the above entitled cause and that on Wednesday, the 31st day of January, A. D. 1945, he caused to be sent by mail to Messrs. Milam, McIlvaine & Milam, whose address is Greenleaf Building, Jacksonville, Florida, a copy of the foregoing motion to dismiss the appeal in the above entitled cause. That the same was duly contained in an envelope securely sealed and addressed to the said Messrs. Milam, McIlvaine & Milam at said address in the Greenleaf Building in the city of Jacksonville, Florida, and that upon the envelope in which the same was enclosed, there were uncancelled postage stamps sufficient to carry the same to its destination.

George M. Powell.

Sworn to and subcribed before me this the 31st day of January, A. D. 1945. Evelyn Davis, Notary Publice, State of Florida at Large. My commission expires Mar. 8, 1947. (Seal.)

[fol. 232] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

OPINION DENYING MOTION TO DISMISS APPEAL—February 27, 1945

An Appeal from the Circuit Court for Dade County, Paul D. Barns, and Marshall C. Wiseheart, Judges.

Milam, McIlvaine & Milam, Edward E. Fleming and Elisha Hanson (Washington, D. C.) for Appellants.

J. Tom Watson, Attorney General and George M. Powell, Assistant Attorney General, for Appellee.

ADAMS, J.:

John D. Pennekamp and The Miami Herald Publishing Company were found in contempt of court by Judges Paul D. Barns and Marshall C. Wiseheart in that they had published cartoons and editorials derogatory to the court. The [fols. 233-235] sentence was that Pennekamp pay a fine of $250.00 and The Miami Herald Publishing Company pay a fine of $1000.00. Said sums to be paid into the Dade County Fine and Forfeiture Fund and in default of payment an execution issue for same.

Doubt as to the proper method to review the judgment prompted them to enter an appeal and at the same time to apply for a writ of certiorari. Several motions are now before us. One by the state to dismiss the appeal. Another by the appellants to consolidate the appeal and petition for certiorari and another to defer ruling on the motion to dismiss until final hearing.

The primary question is which is the proper method to review the judgment and should we decide the question now or wait until final hearing? We see no reason to delay deciding the question but on the contrary think it should be settled first.

We are without precedent in Florida on this question, inasmuch as we have reviewed no judgment in contempt like this. The rule is, that ordinarily certiorari will not lie where there is another adequate remedy. Kilgore vs. Bird, 149 Fla. 570, 6 So. 2d 541.

Heretofore we have reviewed judgments in contempt by habeas corpus. Such remedy is not applicable to this case inasmuch as the judgment does not detain the appellants. Contempt proceedings are criminal in nature. Rule 37 of this Court provides that appeals shall be taken in criminal cases in conformity to Section 290, Florida Criminal Procedure Act.

We hold that appeal is the proper method to review the judgment. The motion to dismiss the appeal is denied.

So ordered.

Chapman, C. J. Terrell and Buford, J. J. Concur.

[fol. 236] IN THE SUPREME COURT OF FLORIDA

JOHN D. PENNEKAMP and THE MIAMI HERALD PUBLISHING COMPANY, Appellants,

vs.

THE STATE OF FLORIDA, Appellee

OPINION—Filed July 24, 1945

An Appeal from the Circuit Court for Dade County, Paul D. Barns and Marshall C. Wiseheart, Judge.

Milam, McIlvaine & Milam, Edward E. Fleming and Elisha Hanson (Washington, D. C.) for Appellants.

J. Tom Watson, Attorney General and George M. Powell, Assistant Attorney General, for Appellee.

F. M. Hudson, James M. Carson, M. L. Mershon and Giles J. Patterson, as Amicus Curiae.

TERRELL, J.:

On November 2, 1944, the Circuit Court of Dade County issued a citation to John D. Pennekamp and the Miami Herald Publishing Company, appellants, commanding them to show cause on a day certain why they should not be adjudged in contempt. The basis for the citation was two editorials and a cartoon published in the Miami Herald. The first editorial and the cartoon were published November 2, 1944, and were as follows:

"Courts Are Established—

For the People

The Courts belong to the people. The people have [fol. 237] established them to promote justice, insure obedience to the law and to Punish Those Who Wilfully violate it.

The people maintain the courts by providing the salaries of officials and setting up costly chambers and courtrooms for the orderly and dignified procedure of the tribunals.

"Upon the judges the people must depend for the decisions and the judicial conduct that will insure society—as a whole and in its individuals—against those who would undermine or destroy the peace, the morality and the orderly living of the community.

In order that the courts should not be amenable to political or other pressures in their determination of matters placed before them, Florida Circuit Judges are called upon to face the electorate less often than are other elective office holders.

So long are their terms, in fact, that in Dade County no circuit judge, and only one judge of another court, has come to the bench by public choice in the first instance. All the others have been named by a governor to fill a vacancy caused by death or resignation, or similar circumstance.

Judicial terms in Dade County run:

1. Six years each for six Circuit Judges
2. Four years each for two Civil Court of Record Judges
3. Four years for the judge of the Criminal Court of Record.
4. Four years for the judge of the Court of Crimes
5. Four years for County Judge
6. Four years for Juvenile court judge.

These twelve judges represent the majesty and the sanctity of the law. They are the first line of defense [fol. 238] locally of organized society against vice, corruption and crime, and the sinister machinations of the underworld.

It is beyond question that American courts are of, by and for the people.

Every accused person has a right to his day in court. But when judicial instance and interpretative procedure recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embar-ass and nullify prosecution, then the peoples' rights are jeopardized and the basic reason for courts stultified.

The seeming ease and pat facility with which the criminally charged have been given technical safeguard have set people to wondering whether their courts are being subverted into refuges for lawbreakers.

This week the people, through their grand jury, brought into court eight indictments for rape. Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn. Back they went to the grand jury for re-presentation to the court.

Only in the gravest emergency does a judge take over a case from another court of equal jurisdiction. A padlock action against the Brook Club was initiated last spring before Judge George E. Holt, who granted a temporary injunction.

"After five months, the case appeared Tuesday out of the blue sky before Judge Marshall C. Wiseheart at the time State Attorney Stanley Milledge was engaged with the grand jury.

Speedy decision was asked by defense counsel despite months of stalling. The State Attorney had to choose

between the grand jury and Judge Wiseheart's court. [fol. 239] The judge dismissed the injunction against the club and its Operators. The defense got delay when it wanted a prompt decision from the court when it profited it.

On October 10 Judge Holt had before him a suit by the state to abate a nuisance (bookmaking) at the Tepee Club.

Five affidavits of persons who allegedly visited the premises for the purpose of placing bets were introduced by the state over the objection of the defendants.

Judge Holt ruled them out, explaining in denying the injunction against the Tepee Club.

The defendant cannot cross-examine an affidavit.

The Court cannot determine who is testifying and whether belief can be placed upon such testimony * * * The fact that such affidavits were taken before the State Attorney does not give them any additional weight or value.'

This may be good law, exact judicial evaluation of the statutes. It is, however, the character of legal interpretation which caused people to raise questioning eyebrows and shake confused heads in futile wonderment.

If technicalities are to be the order and the way for the criminallly charged either to avoid justicy altogether or so to delay prosecution as to cripple it, then it behooves our courts and the legal profession to cut away the dead wood and the entanglements.

Make it possible for the state's case, the peoples' case, to be seen with equal clarity of judicial vision as that accorded accused lawbreakers. Otherwise-technicalities and the courts make the law, no matter what the will of the people and of their legislators."

(Here follows 1 photograph, side folio 239a)

But, Judge!

[fol. 240] The second editorial was published November 7, 1944, and is as follows:

"Why People Wonder

Here is an example of why people wonder about the law's delays and obstructing technicalities operating to the disadvantage of the state—which is the people in prosecutions.

After stalling along for months, the defense in the padlock case against the Brook Club appeared before Judge Marshall C. Wiseheart for a decision. The State Attorney was working with the grand jury. The court knocked out the injunction. There was speed, dispatch, immediate attention and action for those charged with violation of the law. So fast that the people didn't get in a peep.

That's one way of gumming up prosecution.

Another is to delay action. * * *"

A motion to quash the citation was denied. Appellants then filed their answer in which they admitted full responsibility for each publication but denied any intention to misrepresent the facts or to charge the individual judges with [fol. 241] wrongdoing. They avow that it was their purpose to correct abuses in the law of Florida and that they were protected in all they said by freedom of the press. The answer was supported by affidavits. On trial of the issue made by the citation and the answer, the court adjudged respondents guilty of contempt. A fine of $250.00 was imposed on Pennekamp and a fine of $1000.00 was imposed on the Miami Herald Publishing Company, the owner and publisher of the Miami Herald. From the judgment so imposed, an appeal and an appeal by certiorari were prosecuted. By opinion filed February 27, 1945, not yet reported, we held that appeal was the proper method to review the judgment.

A number of questions are urged but they all turn on that of whether or not the cartoon and the editorials were of such content as to warrant the judgment for contempt.

The appellants contend that this question must be answered in the negative because (1) the citation does not show a clear and present danger to obstruct or impede the administration of justice, (2) the editorials related to matters concluded which under the common law and the law of

Florida were not contemptuous, (3) the cartoon was ambiguous and was not contemptuous because the sworn return disavows any attempt to so apply it, (4) omission from the editorial of the fact that the state attorney had approved quashal of the indictments and that new indictments were present did not render them contemptuous, and (5) it does not amount to criminal contempt for a newspaper to comment editorially on what it considers erroneous court procedure with the view of eliminating technical defenses and improving the administration of justice.

Appellee contends on the other hand that the law of Florida as propounded in the case of In re Hayes, 72 Fla. 558, 73 So. 362, is controlling, that no question of pleading is involved and that the "clear and present danger cases" relied on by appellants are not pertinent, the reason being that each case is determined in the light of its environment, the test being whether the words used will create the sub- [fol. 242] stantive evil that Congress and the Legislature have the power to prohibit.

With the line of cleavage to drawn, let us examine the law of Florida on which the Hayes case was predicated. Section Thirteen of the Declaration of Rights, Florida Constitution, provides: "Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the press. * * *"

By Act of the territorial council, November 28, 1928, it was provided that contempts may be punished by Florida courts after due notice but that nothing said or written in vacation to or of any judge or of any decision made by him shall be construed as contempt. Section 38.22, Florida Statutes 1941, provides that every court may punish contempts against it, but the punishment imposed by a justice of the peace shall not exceed twenty dollars fine or twenty-four hours imprisonment.

Sections 38.23 and 932.04, Florida Statutes 1941, are also pertinent here and are as follows:

> "Section 3823. A refusal to obey any legal order, mandate, or decree, made or given by any judge either in term time or in vacation relative to any of the business of said court, after due notice thereof, shall be considered a contempt, and punished accordingly.

But nothing said or written, or published, in vacation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt."

"Section 932.23. Said courts, in the exercise of their criminal jurisdiction, may punish for contempt as in the exercise of their civil jurisdiction, and the criminal courts of record shall possess, in this respect, the same powers as the circuit courts."

[fol. 243] The law thus quoted has been the guide of the courts of Florida in contempt matters for more than one hundred years. This court has from its inception recognized the distinction between contempts committed outside of and those committed within its presence. Ex parte Earman, 85 Fla. 297, 95 So. 755. It has likewise recognized the distinction between civil and criminal contempts and may punish the latter without notice or rule to show cause. S. A. L. Ry. Co. vs. Tampa Southern R. R. Co., 101 Fla. 468, 134 So. 529.

The early contempt cases to reach this court were brought by attachment as in England. State vs. Johnson, 13 Fla. 33. In some of these cases it was held that appeals would not lie. Caro vs. Maxwell, 20 Fla. 17. Later their validity was tested by habeas corpus. Ex parte Senior, Jr., 37 Fla. 1, 19 So. 652. The practice in contempt has never been regulated by statute in Florida as it is by Congress in the Federal Courts. It has been regulated by the State Courts and the regulation has been so satisfactory that the tendency of the Legislature has been to extend rather than limit the power of the courts.

The Court is shown to have followed approved procedure, is not charged with being arbitrary or unfair, and offered to retire from the case if appellants felt that they would prefer to be tried by another judge, so there is no merit to the error assigned on this point. The statutory reasons disqualifying a judge to sit in a cause do not necessarily apply in contempt cases. Punishment for contempt is not for a cause personal to the Court; if the contempt is criminal, as in this case, it is a matter of public concern and is imposed to vindicate orderly procedure. We do not find a piffle of factual basis to disqualify the judge in this case; orderly judicial procedure was the only question at stake.

In the case of In re Hayes, supra, this Court held that

publishers of newspapers have the right but no higher right than others to publish the conduct of the courts, but such right is limited by the obligation to observe respect for [fol. 244] truth and fairness, that freedom of speech and the press contemplates the right of the public to know and discuss all judicial proceedings but this does not include the right to attempt, by wanton defamation and groundless charges of unfairness and partisanship, to degrade the tribunal and impair its efficiency; that prohibition of the abridgement of the press does not secure immunity from punishment to any citizen who falsely and with the purpose to defame, attacks in the newspapers the character of any other citizen, or impugns the integrity, honor, and authority of the courts. The Hayes case is the best reasoned case we have found on the subject and is supported by the current of state and Federal decisions throughout the country. See Dangel on Contempt, page 161, paragraph 355, where contempt is discussed at length and many cases cited. See also Sullivan, Contempt by Publication, page 18, and Rapalje, same subject where the cases are discussed at length and similar conclusion reached.

The Hayes case grew out of an editorial published in a Pensacola paper in which it was charged that in the litigation of a certain cause this court was "partisan", "stubborn", "hostile to counsel" and "ignorant," for which the editor and publisher were attached and adjudged in contempt. The court grounded its judgment squarely on the theory that the people demand a high standard of character, virtue, and intelligence in the judiciary, that there is reposed in them a high and sacred trust, controversies affecting their lives, liberty, and property, and that in the adjudication of such controversies the "exhibition by the justices of ignorance, stubborn-ess, hostility to any party to the cause or his representatives, unfairness, partiality and partisanship would destroy the efficiency and authority of this court, bring it into contempt of the people and prepare the way for breaches of the peace and possible bloodshed among our citizens."

The charge here is that both the editorials and the cartoon were predicated on inaccurate, distorted, incomplete and [fol. 245] biased reports of pending litigation, that the purpose and effect of the editorials and the cartoon were to impute partisanship and favor on the part of the circuit judges to those charged with crime and that such partisan-

ship was so pronounced that they refused to heed the voice of the peoples' representatives.

Let us examine the editorials and the cartoon and assess the basis for this charge. The editorial of November 2 is in five sections; the first and second sections are in the main factual and deductive statements that are not material to the charge. The third section charges that courts sometimes go out to find every possible technicality of the law to protect the defendant, to nullify prosecution, the result being that the peoples' rights are jeopardized and the basic reason for courts stultified. The people then wonder whether their courts are being subverted into refuges for lawbreakers.

The first paragraph of the fourth section then proceeds to illustrate the charge made in the third section by charging that Judge Paul D. Barns at the behest of the defendant peremptorily sent eight indictments for rape back to the grand jury for re-presentation and re-indictment because they were not properly drawn. The facts were that when the first of the eight rape cases was called the court was confronted with a motion to quash the indictment; on consideration of the motion the prosecuting attorney agreed with the court that the indictment was defective because of failure to name the person raped and that the other seven were infected with a similar defect. The grand jury was in session and Judge Barns promptly referred all the indictments back to the grand jury by which they were reconsidered and new indictments were returned within twenty-four hours.

Paragraphs two, three, four, and five of the fourth section of the editorial of November 2 charge that a padlock case was instituted against the Brook Club (a road house of local note) before Judge Holt but through some mysterious means, after five months, it was called up by Judge [fol. 246] Wiseheart at defendant's insistence and peremptorily dismissed; hence the defendant got delay when it wanted it and a prompt dismissal when it desired. The facts are that the Brook Club case was regularly instituted before Judge Holt and proceeded to issue promptly and months after the issues were matured and the case ready for trial, it was set down on motion to dismiss with notice to opposing counsel. Every step in the cause was regular and the motion to dismiss was called up before Judge Wise-

lieart, because Judge Holt was out of the circuit. This court can take judicial knowledge that Judge Hunt had been called into the armed services and that Judge Barns being the senior circuit judge had a very broad discretion under the law in assigning cases to other judges.

The concluding paragraphs of Section four have to do with a suit to abate a nuisance (bookmaking at the Tepee Club) wherein Judge Holt ruled incompetent as evidence five affidavits. No other evidence was offered by the prosecution; temporary injunction was denied. The editorial then goes on to interpolate other derogatory matter and concludes by suggesting that such interpretations make the people raise questioning eyebrows and give the State's case an unequal chance with that of an accused lawbreaker.

The editorial of November 7 emphasizes that of November 2 by restating some of the groundless charges against the judges and then pyramiding deception on deception by insinuating that Judge Wiseheart disposed of the Brook Club case at the will and behest of the defendant while the prosecution was engaged with the grand jury. Consequently the people "did not get in a peep". So the vice in both the editorials was the distorted, inaccurate statement of facts and with that statement were scrambled false insinuations that amounted to unwarranted charges of partisanship and unfairness on the part of the judges.

The record was available in all these cases and it does not reveal a breath of suspicion on which to predicate partisanship and unfairness on the part of the judges. It is shown [fol. 247] rather that they acted in good faith and handled each case to the very best advantage possible. There was no judgment that could have been entered in any of them except the one that was entered. If the editorials had stated the facts correctly, nothing but a correct conclusion could have been deduced and there would have been no basis for contempt but here they elected to publish as truth a mixture of factual misstatement and omission and impose on that false insinuation, distortion, and deception and then contend that freedom of the press immunizes them from punishment.

The cartoon is, if possible, a worse perversion than the editorial. By pictograph, it emphasizes the welter of false imputation in the editorials and perverts the symbol of law and justice. Since Chief Justice Coke said to King James I, "The King is under God and the law", the judge has been

the symbol of law and justice as familiar to the people of this country as the symbol of Uncle Sam. Speak the word "Judge" and there arises the visage of Marshall, Miller, Holmes, Brandeis, Taylor, or Whitfield, the very symbol of Justice and wisdom. It is quite true that in rare instances, those who donned the silk fell below type, but we have become so accustomed to associate these virtues with the "Judge" that they have become a part of our common heritage.

The symbol of the judge in the cartoon does not reflect one attribute of this well known judicial concept. He wears the bloated "beer blossom" face of the gay nineties and looks as though he had spent the night before on a jag. The symbol of the defendant fawning over the judge may typify the wishful thinking of the organized criminal gang, but to one indoctrinated with respect for law and order it has more the likeness of the overlord of Plutos kingdom. At any rate, a defendant seated on the dais by the side of and fawning over the judge is a gross slander of our method of administering justice and warrants severe censure. The symbol of a manikin representing the public imploring the court is likewise irrational and a prostitution of anything known to court room procedure.

The cartoon and the editorials assimilated, the deduction [fol. 248] is inescapable that the circuit judges of Dade County are grabbing at technicalities to free criminals, that the voice of the people is thrown to the discard, that trials are juggled at the behest of the criminal, that the courts are in league with the underworld and will sanction any species of sham plea to give it the breaks. We can think of no better build-up on which the cerebral plummet could fathom a state of partisanship and unfairness more libelous to the court. Appellants contend that no such interpretation was intended but the answer to this contention is that a "man reveals his mind by the symbols he adopts" and we find no reason to conclude that appellants did not adopt their symbols deliberately. The Miami Herald is one of the leading newspapers in the southeast. It has a daily circulation of 125,000 and Dade County has a population of more than 300,000. The Circuit Court of Dade County disposes of more than 7000 cases per year. The Miami Herald was engaged in what was known locally as an anti-vice crusade and had singled out the circuit judges as aiders and abbetters in the object of its wrath. In the light of this factual

recitation, it is utter folly to suggest that the object of these publications was other than to abase and destroy the efficiency of the court.

We have read Toledo Newspaper Company vs. United States, 247 U. S. 402, 38 Sup. Ct. 560, 62 L. Ed. 1186; Nye vs. United States, 313 U. S. 33, 61 Sup. Ct. 810, 85 L. Ed. 1172; Near vs. Minnesota, ex rel. Olson, 283 U. S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357; Patterson vs. Colorado, 205 U. S. 454, 27 Sup. Ct. 556, 51 L. Ed. 879, but we do not think any of them collide with the views expressed in this case. We also agree that publications about a case that is closed, no matter how scandalous, are not punishable as contempt. This is the general rule but the Florida Statute is more liberal than the rule.

What has been said brings this case easily within the rule announced in the Hayes case, supra, on authority of which the judgment might with propriety be affirmed but appellants insist that they are immunized from the judgment imposed on them by their right of freedom of the press. [fol. 249] They rely on Bridges vs. California, 314 U. S. 252, 62 Sup. Ct. 190, 86 L. Ed. 192, to support this contention. It is also contended that the Bridges case prescribed a rule of decision by which all state and federal courts must be governed in imposing judgments for contempt by publication.

The Bridges case has undoubtedly created a variety of opinion as to what the law of contempt is and as to what circumstances warrant its punishment by state courts, but we do not follow appellants in their interpretation of it. The provision of the Florida Constitution under which this Court proceeded in the Hayes case was not materially different from that in many other state constitutions. The provision in the First Amendment to the Federal Constitution protecting freedom of the press was a prohibition imposed on Congress and had nothing to do with the States. The Fourteenth Amendment adopted in 1868 dealt with a subject matter entirely foreign to freedom of the press, but in Gitlow vs. New York, 268 U. S. 625, 45 Sup. Ct. 625, 69 L. Ed. 1138, decided in 1925, the court said that the Fourteenth Amendment extended the immunity in the First Amendment to the States. So it was not until 1925 that anyone dreamed that the Federal Constitution had anything to do with the punishment for contempt under state law. In fact, Federal holdings supported this belief. Prudential

Insurance Co. vs. Cheek, 259 U. S. 530, 42 Sup. Ct. 516, 66 L. Ed. 1044. The States had been exercising the power to punish for contempt for more than a hundred years and we find nothing in the Bridges case indicating a purpose to supersede state law and decisions on the question or to require state courts to conform to Federal pattern.

The majority opinion in the Bridges case appears to have been predicated on the doctrine of the concurring opinion of Mr. Justice Brandeis in Whitney vs. California, 274 U. S. 357, 47 Sup. Ct. 651, 71 L. Ed. 1095. The Court was then concerned with free speech and assembly rather than freedom of the press and the gist of the holding was that in order to support a finding of "clear and present danger", [fol. 250] it must be shown either that immediate serious violence was to be expected or was advocated or that past conduct furnished reason to believe that such advocacy was then contemplated.

The "clear and present danger cases" had their inception in Schenck vs. U. S., 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470, wherein Mr. Justice Holmes couched the doctrine in these words, "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that 'The State' has a right to prevent". In the Bridges case, the Court says that the "substantive evil likely to result must be extremely serious and the degree of imminence extremely high before utterances can be punished" and that free press "must be given the broadest scope that can be countenanced in an orderly society".

So given its broadest scope, we cannot say that the Bridges case did more than decide the law of that case. We think the rule still persists that each case must stand or fall by the facts presented. All the cases and text books uphold this doctrine. In the Bridges case, the Court in terms recognized that California had no law punishing "publication made outside the court room" as contemptuous, while in the case at bar, as previously pointed out, every step was taken under the statute, recognized for more than one hundred years. There being no law in California regulating the subject matter, the Supreme Court was relegated to the facts presented on which it determined the case and held that they would not support the judgment.

Prior to the adoption of the Fourteenth Amendment, there was no theory upon which Federal courts could interfere with the states in defining and punishing abuses of freedom of the press. The only condition imposed on the state's power by the Fourteenth Amendment is the observance of due process; in other words, the judgment of the statute assaulted must not be arbitrary, unreasonable, or discriminatory. It necessarily follows that the only question that can properly be raised here goes to the reasonable-[fol. 251] ness, arbitrariness, or the discriminatory character of the contempt judgment or the Florida law under which it was imposed. This question appellants have by-passed and have elected to stand on their immunity from punishment under the Fourteenth Amendment.

If appellant's theory that the judgment appealed from abridges their liberty of the press as guaranteed by the First and Fourteenth Amendments to the Federal Constitution is pursued to its ultimate conclusion, it necessarily follows that the power of the States in the premises is abrogated. We do not think the Bridges case is susceptible to that interpretation. We think that the reservations to the states in the Tenth Amendment are still vital, that State Courts still have the power when properly authorized to punish for contempt, and if not unreasonably or arbitrarily exercised, their judgments will be upheld. We have examined the editorials and the telegram involved in the Bridges case and we find nothing in them assaulting the integrity of the court. They would not have been contemptuous under the rule in the Hayes case.

We have examined the case of People of the Virgin Islands vs. Canute Brodhurst, Sr., U. S. Circuit Court of Appeals, Third Circuit, decided March 21, 1945, which is also relied on by appellants but we do not think it rules this case. It was disposed of on the theory that the provisions of the St. Croix Code relied on were repealed by what was known locally as the organic act and being so the Court was without authority to impose the judgment for contempt.

We think the cases generally hold that while the abridgment of freedom of the press is the exception, and that while it cannot be done on grounds as tenuous as those which authorize the regulation of a public utility or a corporation for profit, it may be done to "prevent grave and immediate danger to interests which the State may lawfully protect." West Virginia State Board of Education vs. Barnett, 319

U. S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 628; Herndon vs. [fol. 252] Lowry, 301 U. S. 242, 57 Sup. Ct. 732, 81 L. Ed. 1066; Thornhill vs. State of Alabama, 310 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093. Certainly the courts are interests which the state may lawfully protect. It is not to be inferred that courts are in any sense immunized from criticism. A newspaper may criticize, harass, irritate, or vents its spleen against a person who holds the office of a judge in the same manner that it does a member of the Legislature and other elective officers, but it may not publish scurrilous or libelous criticisms of a presiding judge as such, or of his judgments for the purpose of discrediting the court in the eyes of the public. Respect for courts is not inspired by shielding them from criticism. This is a responsibility of the judge, acquired over the years by the spirit in which he approaches the judicial process, his ability to humanize the law and square it with reason, the level of his thinking, the consistency of his adherence to right and justice, and the degree to which he holds himself aloof from blocs, groups, and techniques that would sacrifice justice for expediency.

Freedom of the press is not a symbol of the "big stick" that one may flourish with impunity. It is one of the vital elements of democracy in which the public as well as the proprietor has a vital interest. In all the categories of our economic structure, the newspaper business is the only business earmarked in the Constitution. It is not out of place to ask why the newspaper business should enjoy a solicitude not accorded the grocery business, the dry goods business, the restaurant business, the drug business, and scores of other businesses by which men and women shoo the wolf from the door. The newspaper business is subject to the ordinary forms of taxation but it may successfully resist undue taxes and regulations. Other businesses do not enjoy the latter protection. Grosjean et al. vs. American Press Co., 297 U. S. 233, 56 Sup. Ct. 444, 80 L. Ed. 660.

The answer to this question is not far to seek. Our forefathers were committed to the doctrine that democratic processes could not survive, absent a public opinion energized by truth, liberty, equality, and justice. Hence the [fol. 253] reason for a free and unframmeled press as a medium to generate such a type of public opinion. It therefore follows that while the Bill of Rights endowed the press with liberty, it also imposed on it a trusteeship that it may

not abandon or prostitute in the exercise of its freedom.

The propagation of falsehood and deception in the manner shown in this case amounts to a deliberate abandonment of its trusteeship on the part of the press. It would be equally so to permit itself to become the tool of any set or clique for that purpose. Courts cannot function in a free country when the atmosphere is charged with the effusions of a press designed to poison the mind of the public against the presiding judges rather than to clarify the issues and propagate the truth about them. The latter was the press that Mr. Jefferson visioned when he promulgated the thesis, "Our liberty depends on the freedom of the press and that cannot be limited without being lost."

Judge Cooley characterized a free press as any discussion of public matters essential to prepare the people for an intelligent exercise of their rights and duties as citizens. So when we speak of a free press, we think of gathering and disseminating news, the editorial page, or any discussion to promote truth and understanding. Unless it bears some relation to the promotion of truth and understanding, free press may not include the comics, sports, commercial advertisements, and other features that have become part of the modern newspaper. A free press never was contemplated to be a subsidized press open solely to the stockholders or others for a price. In fact, a press with one eye on dividends and the other on hedges to truth and understanding is not a free press as contemplated by the Constitution. The hallmark of a free press is voluntary devotion to the common good; when other motives are dominant, it usually ceases to be free and forfeits public confidence.

It would be trite to contend that important constitutional guaranties are burdened with commensurate duties and responsibilities. It would be just as trite to contend that a free press is one of the essentials of representative democracy and that it pays its debt to the bill of rights [fol. 254] in proportion to the effort it puts to enlighten public opinion and square it with democratic processes. It may also be confidently asserted that a free press is no freer than a free man, the one being as securely bound by approved canons of decency and propriety as the other. Neither is free to do as it will in total disregard of the right of others. The courts have ample power to relieve against encroachments on liberty of the press and to see that all, not merely the elect, have a right to publish their views.

It is commendable in a newspaper to condemn public wrongs and outmoded systems of procedure, to expose vice and corruption or the conduct of public officials who veer from the course charted for them by the law. Bearing these common sense principles in mind, there is no limit to the content or the diversity of information that the press may exhibit to the public. The fact that it derives from antagonistic sources is all the better, since that enables the public mind to evaluate and arrive at a better balanced judgment. Freedom to publish one's views is a principle of universal practice, but when the press deliberately abandons the proprieties and sets out to poison its pabulum or to sow dragons' teeth and dispense canards for the purpose of doing another a wrong, it is in no different category from a free man that does likewise. The most rigid safeguard thrown around a free press would not protect appellants from falsely publishing or announcing to the world that the clergy of Miami were in sympathy with the practice of polygamy or were fostering other doctrines equally obnoxious to approved moral standards.

There is another constitutional guaranty equally as binding as freedom of the press. We have reference to fair and impartial trial guaranteed by Article Six, Federal Constitution, and Section Eleven, Declaration of Rights, Florida Constitution. Freedom of the press cannot be exploited in a manner to destroy fair and impartial trial. There is of course an area in which a pending trial may be discussed as "news" and information concerning it given to the public, but when press reports of a trial are turned into [fol. 255] assaults on the character or integrity of the presiding judge, the jury, or the witnesses, they degenerate into trial by newspaper (often called contempt by publication) and merit condemnation. Bee Publishing Company vs. State, 107 Neb. 74, 185 N. W. 339. Under the English practice, trial by newspaper is punished speedily but wanton criticism of the court is rarely taken account of. The result is that trial by newspaper is practically obsolete in England while in this country, it has in some instances become one of the most vicious impediments to fair and impartial trial.

The theory of our system of fair trial is that the determination of every case should be induced solely by evidence and argument in open court and the law applicable thereto and not by any outside influence, whether of private talk

or public print. Patterson vs. Colorado, 205 U. S. 454, 27 Sup. Ct. 556, 51 L. Ed. 879. In Sullivan on Contempt by Publication, page 180, it is pointed out that trial by newspaper in its subtlety, insidiousness, and positive damage, exceeds all injuries to the judicial processes. To assert that the administration of justice is not thwarted and that a "judge of ordinary fortitude" is not disturbed or perhaps thrown off the beam by assaults of the character shown here, assumes a trend in the mass mind that common experience knows nothing about. Partisan assaults on judges, juries, or witnesses are not within the compass of a free press so long as the case is pending.

We have searched the text books and the cases diligently and we find nothing to support the contention of one of counsel for appellants that freedom of the press protects him if he chooses to lie about the Court and that the Court can do nothing about it unless he lies in the courtroom or his lying is "manifested with such a high degree of imminence as to express a high degree of threat." How imminent the "threat" must be under such a test we do not know and do not labor the point because we are convinced that it is beside the question. The main purpose of contempt under state law is to afford the court a means to enforce decorum [fol. 256] and punish willful disregard of orderly judicial administration. The State Courts touch the public much more frequently than the Federal Courts and they have many reasons to enforce orderly administration that would not arise in the Federal Courts. If that power is to be construed by what appellants contend to be the pattern in the Bridges and Nye cases, then more than one hundred years of state law and decisions on the subject are turned into confusion or set at naught. See Dangel on Contempt, page 161, et seq., for cases and discussion illustrating the scope of state decision on the subject.

We do not think this can be the law. The Bridges case was disposed of on authority of the "clear and present danger cases," which are not analogous to most of the state cases because they arise from a different state of the law. The ultimate test in the Bridges case requires that the "substantive evil must be extremely serious and the degree of imminence extremely high before the utterances can be punished." Even if this test is to the rule in the State Courts, they are authorized to apply it by their own law and standards and unless the application is shown to be arbi-

trary and unreasonable, their judgment should not be disturbed. The law in Florida permits the most liberal exercise possible of freedom of the press but holds to account those who abuse it.

We therefore hold that the cartoon and the editorials afford ample support for the judgment imposed and that the issues were properly adjudicated under Florida law. We do not think that the rule in the Bridges case is applicable but if for any reason it may be held to be the judgment is still free from error because it is not charged that it was applied in an arbitrary or unreasonable manner and if it were, there is no showing to that effect. We do not think freedom of the press can be exercised in a way to vitiate fair and impartial trial nor do we think that it can be employed to harass the court or in total disregard of approved standards of propriety when the rights of others to the cause are adversely affected.

[fol. 257] Affirmed.

Chapman, C. J., Brown, Thomas, and Adams, J. J., Concur. Buford and Sebring, J. J., Dissent.

Brown, J. Dissenting:

I find myself unable to concur in the conclusion reached by the majority of this Court affirming the judgment of contempt. I agree with much of what is said in the very able opinion prepared by Mr. Justice Terrell and I think it would be very easy to follow that opinion in the main and arrive at an opposite conclusion.

As I read the editorials and view the cartoon constituting the basis of the charge, there is nothing in either which imputes a want of fairness, impartiality or integrity to any Judge or any Court. Nor do they appear to have for their purpose or intent the influencing or controlling the determination of the result in any particular case *thesi pendens* in any court. They appear to adversely criticise a judicial system which, to protect the rights of the righteous must, by the same token, see that the alleged rights of the unrighteous are determined.

We who constitute this Court find ourselves often in the position where we must, to preserve the rights of the innocent, reverse the conviction of one who is shown to be guilty but whose conviction has been had in whole or in part

by illegal means. This follows from the recognition of the wisdom of our judicial system. If there be those who think it a bad system they have the right to express their views and, if possible, to get so many converts to their way of thinking that the system may be changed by organic law.

However, aside from this conclusion, we are faced with two opinions, one of the Supreme Court of the United States and one of the Supreme Court of Louisiana, which I am convinced require the reversal of the judgment in the [fols. 258-259] cases of Bridges vs. California, 314 U. S. 252, 62 Sup. Ct. Rep. 190, 86 L. Ed. 192, and Graham vs. Jones, in Re Times Picayune Publishing Co., 200 La. 137, 7 Sou. (2d) 688. Of course, I recognize that the latter case is only persuasive but I think the Bridges case is binding and that in the absence of showing of *clear* and *present danger* of influencing or controlling the determination in any particular case, then pending in any court, created by the publication complained of; no punishable contempt is made to appear.

Sebring, J. Concurs in conclusion.

SEBRING, J. concurring in conclusion:

I concur in the conclusion reached that the judgment appealed from must be reversed on authority of Bridges vs. California, 314 U. S. 252, 62 S. Ct. Rep. 190, 86 L. Ed. 192.

[fol. 260] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

DIRECTIONS TO THE CLERK OF THE SUPREME COURT FOR PREPARING TRANSCRIPT FOR CERTIORARI IN THE UNITED STATES SUPREME COURT—Filed August 17, 1945

The Clerk of said Court will please immediately proceed with the preparation of certified transcript of the record in the above entitled proceeding in accordance with the rules of the Supreme Court of the United States for application for writ of certiorari to said Court, and include in said transcript the following:

1. The entire transcript of record in appeal, as certified by E. B. Leatherman, Clerk of the Circuit Court of Dade County, Florida, 17th day of January, 1945.

2. The motion to dismiss the appeal and the order denying said motion;

3. The opinion of the Supreme Court of Florida, dated July 24, 1945;

4. Appropriate certificate to said transcript.

Milam, McIlvaine & Milam, by (S.) E. T. McIlvaine, Attorneys for Appellants.

[fol. 261] STATE OF FLORIDA,
County of Duval:

I, E. T. McIlvaine, of Counsel for Appellants, do hereby certify that on this the 6th day of August, A. D. 1945, I have duly mailed a copy of the foregoing Directions to the following counsel for appellee in said case, that is to say:

1. Hon. J. Tom Watson, Attorney General, Tallahassee, Florida

2. F. M. Hudson, Esquire, Seylold Building, Miami, Florida;

3. Giles J. Patterson, Esquire, Florida National Bank Bldg., Jacksonville, Florida.

(S.) E. T. McIlvaine, Of Counsel for Appellants.

Sworn to and subscribed before me, this 6th day of August, A. D. 1945.

Hugh A. Alderman, Notary Public, State of Florida.
My Commission expires 1 19 46. (Seal.)

[fol. 262] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 263] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 5, 1945

The petition herein for a writ of certiorari to the Supreme Court of the State of Florida is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

FILED
OCT 1 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 473

JOHN D. PENNEKAMP AND THE MIAMI HERALD PUBLISHING COMPANY,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

ROBERT R. MILAM,
E. T. McILVAINE,
Greenleaf Building,
Jacksonville 1, Florida;
EDWARD E. FLEMING,
Ingraham Building,
Miami 32, Florida;
ELISHA HANSON,
729 15th Street, N. W.,
Washington 5, D. C.;
Attorneys for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.

JOHN D. PENNEKAMP AND THE MIAMI HERALD PUBLISHING COMPANY,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

John D. Pennekamp and The Miami Herald Publishing Company respectfully petition for a writ of certiorari to the Supreme Court of Florida to review a decree of said Court entered on July 24, 1945 (R. 152-172), affirming a judgment of the Circuit Court of the Eleventh Judicial Circuit of Florida entered on December 18, 1944 (R. 142-145) holding petitioners guilty of contempt of the Circuit Court of the Eleventh Judicial Circuit of Florida and fining petitioner

John D. Pennekamp $250 and petitioner The Miami Herald Publishing Company $1,000.

The opinion of the Circuit Court (R. 142-145) and of the Supreme Court of Florida (R. 152-172) are as yet unreported.

A

Statement of the Matters Involved

Petitioner The Miami Herald Publishing Company is the publisher of The Miami Herald, a daily newspaper of more than 125,000 circulation published each day at Miami, Florida. Petitioner John D. Pennekamp is the Associate Editor of The Miami Herald.

On November 2, 1944, The Miami Herald printed an editorial and a cartoon in its newspaper published that day. The editorial was entitled "Courts are Established for the People" (R. 6-8). The cartoon was entitled "But Judge" (R. 8a).

On November 7, 1944, The Miami Herald printed an editorial in its newspaper published that day entitled "Why People Wonder" (R. 9).

The editorials dealt with law enforcement generally and mentioned three cases that had been disposed of by the court.

The editorial printed on November 2 referred to two cases in which motions made by counsel for the defense were granted. One motion was to deny a temporary injunction; the other to dismiss a bill of complaint for an injunction where a temporary injunction previously had been ordered by another judge. Both cases involved notorious gambling joints, one of which in an earlier case had obtained an order of dismissal from Judge Barns, one of the accusing judges herein. The original suit was brought in 1940 by the Attorney General of Florida, the State Attorney of Dade

County and the County Solicitor of Dade County. The defendants in this case in their answer frankly admitted they had violated the gambling laws of Florida and asserted they had done so in the belief such violations met with the approval of the local enforcement officers. They promised to put an end to such violations for all time and asked the court to refuse an injunction.

This Judge Barns did.

In January, 1941, there was a change in the office of Attorney General of Florida.

On April 28, 1941, the new Attorney General filed a motion asking leave of the court to withdraw from the case and to take such further action as it deemed appropriate in the premises.

Judge Barns dismissed the case on May 12, 1941, stating that "in litigation it is necessary to have a plaintiff and a defendant, and the plaintiff not desiring to proceed further and having withdrawn" the case was ordered dismissed.

The file of the case contains no motion for withdrawal by the other relators,—the Assistant Attorneys General, the State Attorney of Dade County, or the County Solicitor of Dade County. (R. 53-54.) The statute provided for maintenance of the suit by anyone, indeed any taxpayer (Florida Stats. 1941, Sec. 64.11).

Then in 1944 a new State Attorney initiated another proceeding in chancery against the Brook Club and its owner. In his bill of complaint he recited pertinent portions of the answer filed in the proceedings initiated in 1940 to the same end, namely to abate the nuisance gambling, wherein the defendants admitted violations of law and promised to put a stop to them. Evidence as to later violations, following those admissions and promises, was furnished the court. A preliminary injunction was issued by Judge Holt.

Months later defendants moved to dismiss. The hearing

on the motion was held in the absence of the State Attorney, who could not be present because of his duties before the Grand Jury. An order vacating the preliminary injunction and dismissing the complaint was entered by Judge Wiseheart, one of the accusing judges herein on the ground that no testimony had been offered, although such testimony had been taken in open court before Judge Holt.

The other case referred to in the editorial printed in The Miami Herald on November 2 was known as The Teepee Club case. The Teepee Club was a notorious gambling joint. The record showed numerous previous violations by The Teepee Club and at least two convictions of its operators. The Grand Jury in its report on law violations during this period referred to the records of the Criminal Court of Record for Dade County showing widespread gambling under protection and a fantastic record of the offenders escaping punishment.

On September 23, 1944, a bill of complaint to padlock the Teepee Club for bookmaking was filed in the Circuit Court. It was a chancery proceeding, not a criminal proceeding. The State Attorney who filed the bill of complaint supported it with affidavits of six men who were in the place at the time it was raided by two deputy sheriffs. On October 11, counsel for one defendant moved to suppress the testimony obtained because it was in the form of affidavit testimony taken before a reporter, then subscribed and sworn to by the witness. On October 11, Judge Holt denied the application for a temporary injunction stating that the State had failed to prove its case by competent evidence. He castigated the use of affidavits although the state statute under which the injunction was sought expressly authorized the use of affidavits (Florida Stats. 1941, Sec. 64.12). On the same day the State Attorney filed a motion to set aside the order denying the tem-

porary injunction and renewing his motion for a temporary injunction. The State Attorney contended that under the statutes of Florida evidence obtained by affidavit was good for temporary injunction purposes and supported his motion with various precedents in court decisions. On October 12, Judge Holt denied the motion to set aside the order denying the temporary injunction. The editorial of November 2 commented on this order of Judge Holt (R. 8).

The third reference to proceedings before the Circuit Court read as follows:

> "This week the people through their Grand Jury brought into the Court eight indictments for rape. Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn. Back they went to the Grand Jury for representation to the Court."

Counsel for one of the defendants in these rape cases moved to quash the indictment of his client on the ground that it was defective. The indictment was quashed[1] (R. 11; 55).

The cartoon entitled "But Judge" printed by The Miami Herald in its issue of November 2 contains the figure of a man in the robes of a judge sitting at the bench with the words "The Law" on the back of his chair. At his left

[1] It is significant in this respect that petitioners in the citation for contempt are accused of willfully and wantonly withholding the full truth from the public and failing to fairly report the action of the court and the judge thereof in respect of said indictments by stating only "that 'Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn' withholding the truth by failing to state the act of the representative of the State Attorney's office." The minutes of the court on the day the motion to quash was granted did not show any concurrence in the motion by the representative of the State Attorney's office (R. 55). The minutes were subsequently modified by Judge Barns to show such concurrence (R. 137). The Assistant State Attorney present at that time in an affidavit filed for use in the Supreme Court of Florida denied concurring in the motion. The Miami Herald published a factual story concerning the reinglictment of the defendants when they were reindicted. (See footnote infra p. 9.)

there is the figure of a man grinning with pleasure as he receives from the judge a paper on which the words "Defendant Dismissed" appear. At the right of the judge there is a figure of a small man on whose back are printed the words "Public Interest".

The editorial printed on November 7 was entitled "Why People Wonder". It referred to the Brook Club padlock case dismissed by Judge Wiseheart in the absence of the State Attorney and to another case in which a bus driver was sentenced to 15 days in City Jail by Judge Curry on conviction of beating up a taxicab operator. The arrest of the bus driver precipitated a strike. The driver filed an appeal, posted a $200 appeal bond and the case never proceeded further. The editorial concluded with this statement:

> "There you have the legal paradox, working two ways, but to the same purpose against prosecution. Speed when needed. Month after month of delay when that serves the better."

On November 10, 1944, Judges Paul D. Barns and Marshall C. Wiseheart issued over their signatures from the Circuit Court of the Eleventh Judicial Circuit of Florida a paper entitled "Citation for Contempt" addressed to John D. Pennekamp and The Miami Herald Publishing Company. This citation was not sworn to or verified in any manner. The citation alleged that the two editorials and the cartoon—

> "did reflect upon and impugn the integrity of said Court and the Judges thereof in imputing that the Judges of said Court 'do recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify prosecution,' which said acts by you tend to create a distrust for said court and the judges

thereof in the minds of the people of this county and state and *tend to prevent and prejudice a fair and impartial action of the said Court and Judges thereof in respect to the said pending cases*" (R. 2). (Emphasis supplied.)

No allegation is to be found anywhere in the citation that either of the editorials or the cartoon created a clear and present danger of high imminence to the fair and impartial administration of justice in pending cases before either of the judges signing the citation.

Petitioners were commanded to appear at 10:00 A. M., November 28, 1944, to show cause why they should not be held and adjudged to be in contempt.

Petitioners filed a return to the citation wherein they moved to quash and also wherein they answered the charges of the judges (R. 9-19). Petitioners moved to quash on the following grounds:

1. The Court was without jurisdiction to issue said citation.

2. The said citation was not verified by any person and was not issued in form and manner required.

3. The publications mentioned in said citation were not contemptuous.

4. The publications upon which said citation was based constituted legitimate criticism and comment within the guaranties of Section 13 of the Declaration of Rights of the Constitution of Florida.

5. The publications upon which said citation was based constituted legitimate criticism and comment within the guaranties of the First and the Fourteenth Amendments to the Constitution of the United States.

6. The publications complained of created no clear and present danger to the administration of justice.

In petitioners' answer, supported by affidavits, petitioner John D. Pennekamp admitted responsibility for the publication of the editorials and cartoon complained of by the judges but denied that the editorials and cartoon created a clear and present danger to the orderly administration of justice in the court. Affirmatively it was alleged that said editorials and said cartoon were "intended to be and in fact were published in the interest of orderly and fair administration of justice in Dade County", which affirmation was more fully set forth and supported in affidavits of petitioner Pennekamp (R. 47-50) and Jeanne Bellamy Bills (R. 50-57) attached to the answer and asked to be read as a part thereof.

Petitioners also attached to their answer and asked that it be read as a part thereof a report of the Grand Jury of the Circuit Court of Dade County, Florida, dated November 13, 1944 (a few days after the editorials), calling attention to the breakdown in law enforcement, to the widespread existence of illegal gambling activities in Dade County and to the danger which these conditions engender (R. 19-47).

Hearing was held before Judges Barns and Wiseheart on November 29, 1944. At the outset of the hearing the Judges offered to recuse themselves if petitioners expressed a desire to that end. Petitioners declined to make any suggestion whatever as to the constitution of the court or as to who should sit upon the trial of the case whereupon the accusing judges sat (R. 127-128).

On December 9, 1944, Judges Barns and Wiseheart entered an order denying petitioners' motion to quash the citation for contempt (R. 127-133). On December 15, 1944, Judges Barns and Wiseheart filed a statement of findings

of fact (R. 133-142). On December 18, 1944, Judges Barns and Wiseheart entered a judgment of guilt (R. 142-145).

The Circuit Court in its order said, inter alia:

> "John D. Pennekamp and The Miami Herald Publishing Co., and each of them, are and stand guilty of contempt of the Circuit Court of the Eleventh Judicial Circuit of Florida for making an unfair and untrue report of court proceedings and in turn of making false imputations against the Court and its Judges as such based upon respondents' own unfair and untrue report as appears more fully from the citation and the Court's records;"

Appeal from the judgment of the Circuit Court was duly filed to the Supreme Court of Florida where hearing was held by the full court on May 4, 1945.[2]

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[2] Due to uncertainty under Florida procedure as to correct method of review, the case was taken from the lower court to the Florida Supreme Court both on certiorari (*John D. Pennekamp and The Miami Herald Publishing Company, Petitioners*, v. *The Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, Respondent*) and by appeal (*In Re: John D. Pennekamp and The Miami Herald Publishing Company, Appellants*). The records were identical except that attached to petition for writ of certiorari were the following exhibits not appearing in the appeal record:

1. Photostatic copy of the minutes made by the Clerk of the Circuit Court in Dade County at the time of the ruling (Ex. 1) on the rape indictments which made no reference to the matters charged in the citation and in the judgment as a wilful suppression of fact. These were the only minutes that existed when the editorial was published.

2. Photostatic copy of the minutes of the Circuit Court as later expanded at the direction of Judge Barns after the publication of the editorial and cartoon (Ex. 2).

3. Affidavit of Assistant State Attorney (Ex. 3) stating that he did not concede that the indictments in the rape cases were defective but, because the Grand Jury was still in session and to obviate any question, he would have new indictments returned.

4. Photostatic copy of newspaper item in the Miami Herald of November 1st stating the rape defendants had been duly reindicted and arraigned for trial (Ex. 4).

On February 27, 1945, the Florida Supreme Court ruled that although certiorari or habeas corpus had theretofore been the accepted method of review, that appeal was in this case the proper method.

On July 24, 1945, the Supreme Court of Florida by a five to two vote affirmed the judgment of contempt entered by the Circuit Court (R. 152-172).

The Supreme Court of Florida divided on the issue as to whether the decision of this Court in the case of *Bridges* v. *California*, 314 U. S. 252 (1941), is binding upon the courts of Florida. The majority of the Supreme Court of Florida in an opinion written by Mr. Associate Justice Terrell and concurred in by Chief Justice Chapman and Associate Justices Brown, Thomas and Adams held that the rule laid down in the *Bridges* case was not applicable to this case and that the cartoon and the editorials

> "afford ample support for the judgment imposed and that the issues were properly adjudicated under Florida law."

A dissenting opinion filed by Mr. Associate Justice Buford and concurred in by Mr. Associate Justice Sebring declared there was nothing in either of the editorials or cartoon which

> "imputes a want of fairness, impartiality or integrity to any Judge or any Court. Nor do they appear to have for their purpose or intent the influencing or controlling the determination of the result in any particular case *then pending* in any court. They appear to adversely criticise a judicial system which, to protect the rights of the righteous must, by the same token, see that the alleged rights of the unrighteous are determined."

Mr. Justice Buford in his dissent also said:

> "• • • I think the Bridges case is binding and that in the absence of showing of *clear* and *present danger* of influencing or controlling the determination in any particular case, then pending in any court, created by the publication complained of, no punishable contempt is made to appear." (Emphasis as it appears in dissenting opinion.)

B

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended; 28 U. S. C., Sec. 344(b). The decree of the Supreme Court of Florida to be reviewed was entered on July 24, 1945.

C

Constitutional and Statutory Provisions Involved

The constitutional provisions involved are the First and the Fourteenth Amendments to the Constitution of the United States and Sec. 13 of the Declaration of Rights of the State of Florida.

The statutory provisions involved are Sec. 2.01 of the Florida Statutes of 1941 incorporating the Common Law of England down to July 4, 1776, where not inconsistent with the Constitution and Laws of the United States and the acts of the Florida Legislature, into the laws of Florida and Secs. 38.22 and 38.23 of the Florida Statutes of 1941 defining contempt of court. Also Secs. 64.11 and 64.12 of the Florida Statutes of 1941.

For the convenience of the Court the constitutional and statutory provisions are set forth in Appendix A attached to this petition.

D

Question Presented

Whether in a contempt proceeding instituted by state court judges for the purpose of punishing a newspaper and its associate editor for publishing editorials and a cartoon that annoyed the judges, state courts are required to follow the rule laid down by this Court for all courts, state and federal and including this Court, that there must be shown a

clear and present danger of high imminence to the administration of justice by the court before there can be a judgment of guilt with resultant punishment.

E

Reasons Relied On for the Allowance of the Writ

1. *The decision of the Supreme Court of Florida in this case is in conflict with the decision of this Court in Bridges* v. *California, supra, and with state court and federal court decisions adhering to the test laid down in the Bridges case.*

As was pointed out in the dissenting opinion, the decision of the Florida Supreme Court in this case is in conflict with this Court's decision in the *Bridges* case and with the decision of the Supreme Court of Louisiana in *Graham* v. *Jones in re Times Picayune Publishing Company*, 200 La. 137; 7 So. (2d) 688. It is also in conflict with *People of Virgin Islands v. Broadhurst*, 148 F. (2d) 636 (C. C. A. 3rd, 1945). The Florida Supreme Court by its challenge of this Court's decision in the *Bridges* case has raised an important question in the application of the law of contempt by publication that should be decided by this Court. Since the *Bridges* case, the Florida Supreme Court is the only state court of last resort to challenge that decision.

2. *The action by the Supreme Court of Florida was arbitrary and capricious and should be reviewed by this Court.*

The record in this case shows that the citation upon which hearing was held, with resulting conviction and judgment affirmed by the Supreme Court of Florida nowhere alleged that the acts of petitioners created any clear and present danger of high imminence to the fair and impartial administration of justice. All that the citation alleged was that the acts of petitioners "*tend to prevent and prejudice a fair and impartial action of the said Court and Judges thereof in*

respect to the said pending cases." The record is indisputable that none of the cases discussed in the editorials was pending. The Brook Club case had been dismissed by Judge Wiseheart. The Teepee Club case had been disposed of by Judge Holt on the only issue in that case presented to him. The indictments in the rape cases had been quashed by Judge Barns. The refusal of the Florida Supreme Court to recognize these facts and to reverse the judgment on appeal was arbitrary and capricious and should be reviewed by this Court.

3. *The holding of the Supreme Court of Florida that the convictions affirmed do not violate the constitutional guaranty of a free press is in conflict with the decisions of this Court in Near* v. *Minnesota*, 283 U. S. 697 (1931); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Bridges* v. *California*, *supra*; *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

All of the foregoing cases related in one way or another to restraint of free speech or the free press. Each of them affirms the special place which these liberties hold in the American scheme of government and affairs. The decision of the Florida Supreme Court in effect reinvokes the ancient English common law concept of the right of judges to punish those whose utterances whether spoken or printed and circulated outside of the immediate presence of the court annoy them. This Court has said in no uncertain terms that the English common law is inapplicable in this country on questions concerning liberty of speech and press. It has also said:

> "The fact that the liberty of press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous

restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." *Near* v. *Minnesota*, 283 U. S. at 719.

The procedure invoked by the Circuit Court judges in this case resulting in the conviction and punishment of petitioners and affirmed by the Supreme Court of Florida is repugnant to the constitutional guaranty of a free press and should be reviewed by this Court.

WHEREFORE, your petitioners pray that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of Florida, to the end that this cause may be reviewed and determined by this Court; that the decree of the said Supreme Court be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

ROBERT R. MILAM,
E. T. MCILVAINE,
Greenleaf Building,
Jacksonville 1, Florida;
EDWARD E. FLEMING,
Ingraham Building,
Miami 32, Florida;
ELISHA HANSON,
729 15th Street, N. W.,
Washington 5, D. C.,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.

JOHN D. PENNEKAMP AND THE MIAMI HERALD PUBLISHING COMPANY,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Preliminary Statement

The opinions below, the statement of the matter involved, jurisdiction, and the question presented appear in the Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II

Summary of Argument

Point 1. The decision of the Supreme Court of Florida upholding the conviction of petitioners for contempt in a

proceeding based upon an allegation that petitioners' utterances merely tended to prevent and prejudice a fair and impartial action of the court and the judges thereof is in conflict with the decision of this Court in *Bridges* v. *California*, 314 U. S. 252-305 (1941), and with state and federal court decisions adhering to the test laid down in the *Bridges* case. In effect the Supreme Court of Florida has challenged the application of the *Bridges* case to contempt proceedings intituted by judges in that state and has ruled that such proceedings are properly settled under the laws of Florida without reference to the holding of this Court. If the decision of the Florida Supreme Court is not reviewed and set aside by this Court then the whole purpose of the *Bridges* case to lay down a test applicable to both state and federal courts will have been defeated.

Point 2. The record in this case shows that the citation upon which hearing was held with the resulting conviction of petitioners which conviction was affirmed by the Supreme Court of Florida nowhere alleged that the acts of petitioners created any clear and present danger of high imminence to the fair and impartial administration of justice. The record is indisputable that none of the cases discussed in the editorials was pending before the Court at the time the editorials were printed. The refusal of the Florida Supreme Court to recognize these facts and reverse the judgment on appeal was arbitrary and capricious.

Point 3. The holding of the Supreme Court of Florida that the convictions affirmed do not violate the constitutional guaranty of a free press is in conflict with the decisions of this Court in *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Lovell* v. *Griffin*, 303 U. S. 444 (1938);

Cantwell v. Connecticut, 310 U. S. 296 (1940); *Bridges v. California*, supra; *Murdock v. Pennsylvania*, 319 U. S. 105 (1943). Each of these cases related in one way or another to restraint of free speech or the free press. Each of them held that these liberties cannot be restrained. This Court has held that subsequent punishment for abuses as may exist is the appropriate remedy consistent with constitutional privilege. The procedure invoked by the Circuit Court judges in this case resulting in the conviction as affirmed by the Supreme Court of Florida is repugnant to the guaranty of a free press.

III

ARGUMENT

Point 1

The decision of the Supreme Court of Florida in this case is in conflict with the decision of this Court in Bridges v. California, supra, and with state court and federal court decisions adhering to the test laid down in the Bridges case.

In *Bridges v. California*, this Court measured a power of all American courts, both state and federal. It said that the possibility of disrespect for the judiciary as the result of the published criticism of a judge is not such a substantive evil as will justify impairment of the constitutional right of freedom of speech and press.

For all time it disposed of the contention that the English common law is applicable on questions concerning liberty of speech and the press.

Further it reaffirmed the decision in *Nye v. United States*, 313 U. S. 33 (1941), overruling *Toledo Newspaper Company v. United States*, 247 U. S. 402 (1918). The *Toledo* case applied the reasonable tendency test. The *Nye* case ruled flatly that courts have power to punish for contempt

only where there is a clear and present danger of high imminence.

A tendency to obstruct was all that was alleged in the citation directed to petitioners. It was upon that charge and that charge alone they were convicted and their conviction affirmed by the Supreme Court of Florida.

The Supreme Court of Florida in its opinion in addition to challenging this Court's decision in the *Bridges* case also challenged this Court's holding that the Fourteenth Amendment prohibits infringement by state legislatures of those rights and liberties guaranteed against infringement by Congress in the federal constitution (R. 166). After so asserting its challenge, the Florida Court said:

> "It necessarily follows that the only question that can properly be raised here goes to the reasonableness, arbitrariness or the discriminatory character of the contempt judgment or the Florida law under which it was imposed. This question appellants (petitioners herein) have by-passed and have elected to stand on their immunity from punishment under the Fourteenth Amendment." (R. 166.)

The court concluded its opinion by saying:

> "We therefore hold that the cartoon and the editorials afford ample support for the judgment imposed and that the issues were properly adjudicated under Florida law. We do not think that the rule in the Bridges case is applicable but if for any reason it may be held to be, the judgment is still free from error because it is not charged that it was applied in an arbitrary or unreasonable manner and if it were, there is no showing to that effect. We do not think freedom of the press can be exercised in a way to vitiate fair and impartial trial nor do we think that it can be employed to harass the court or in total disregard of approved standards of propriety when the rights of others to the cause are adversely affected." (R. 171.)

Two judges of the Florida Supreme Court refused to concur in the decision. In a dissenting opinion they said—

> "• • • there is nothing in either (the editorials and cartoon) which imputes a want of fairness, impartiality or integrity to any Judge or any Court. • • • They appear to adversely criticise a judicial system which, to protect the rights of the righteous must, by the same token, see that the alleged rights of the unrighteous are determined." (R. 171.)

The dissenting judges insisted the rule in the *Bridges* case is binding and should be applied.

As for the Florida law, it contains no definition of contempt by publication (See Sec. 38.23 of the Florida statutes of 1941). The Florida statutes do provide, however, that the common law of England down to July 4, 1776, shall be in force in Florida provided it is not inconsistent with the Constitution and laws of the United States and the Acts of the legislature of Florida. (Sec. 2.01 Florida Statutes, 1941).

Thus it was under the ancient English common law that petitioners were cited, convicted and their conviction affirmed by the Florida Supreme Court and in conflict with this Court's decision in *Bridges* v. *California, supra,* and with the state and federal court decisions hereinbefore cited. That conflict should be resolved by this Court.

Point 2

The action by the Supreme Court of Florida was arbitrary and capricious and should be reviewed by this Court.

The action by the Supreme Court of Florida was arbitrary and capricious. It was aimed at enforcing silence in the name of preserving the dignity of the bench. It must be recalled that the editorials and cartoon referred to no

matters pending at the time they were published. The Brook Club case had been dismissed by Judge Wiseheart; the Teepee Club case had been disposed of when the application for temporary injunction was denied by Judge Holt; the rape indictments had been quashed by Judge Barns.

The citation didn't even allege that the comments of petitioners created any clear and present danger of high imminence to the administration of justice. The Florida Supreme Court recognized this and in so doing revived the ancient English common law concept of the power of judges to punish summarily for contempt in order to affirm the convictions. It sought to set up one rule for judges; another one for all other public officials who consider themselves injured by newspaper comment.[3]

What the Florida Supreme Court has done in effect is to say to this Court:

> "In Florida, judges have the right and may exercise the power if they so desire, to punish any one in

[3] As an illustration of the capricious and arbitrary length to which the Florida court went, reference is made to this statement in the majority opinion:

> "We have searched the text books and the cases diligently and we find nothing to support the contention of one of counsel for appellants that freedom of the press protects him if he chooses to lie about the court and that the court can do nothing about it unless he lies in the courtroom or his lying is 'manifested with such a high degree of imminence as to express a high degree of threat'."

The record contains no justification for that statement. Counsel made no such contention. Judge Barns in putting the questions to him said he asked them without application to petitioners herein and merely academically. The purpose of the questions obviously was to force counsel into an admission that judges have greater rights than other public officials in respect of criticism of their actions. Counsel's replies were that they have no greater, no lesser rights; and whether the articles complained of were true or false, judges had to respect the constitutional guaranties and avail themselves of the appropriate remedy. No sweeping claim of absolute immunity for the press was advanced. The remedy of subsequent punishment was fairly stated as the one to be applied when abuses actually occurred. (R. 58-61.)

a contempt proceeding whose comment concerning their activities annoys them. The First Amendment, and the Fourteenth Amendment to the Constitution of the United States do not apply in Florida. The decisions of the Supreme Court of the United States have no binding force and effect upon the courts of Florida."

As against this position this Court has said:

"* * * The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect. * * *

"* * * The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting hall, the radio and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases." *Bridges* v. *California*, 314 U. S. at pp. 270-271.

The refusal of the Florida Supreme Court to recognize the effect on Florida courts of the provisions of the First and the Fourteenth Amendments as construed by this Court was arbitrary and capricious. Its judgment should be reviewed.

Point 3

The holding of the Supreme Court of Florida that the convictions affirmed do not violate the constitutional guaranty of a free press is in conflict with the decisions of this Court in Near v. Minnesota, supra; Grosjean v. American Press Co., supra; DeJonge v. Oregon, supra; Herndon v. Lowry, supra; Lovell v. Griffin, supra; Cantwell v. Connecticut, supra; Bridges v. California, supra; Murdock v. Pennsylvania, supra.

Each of the foregoing cases had to do in one way or another with restraint of free speech or free press.

This Court has held that subsequent punishment for such abuses as may exist in respect of comment upon the actions of public officials—including judges—is the appropriate remedy consistent with constitutional privilege.

This remedy was not invoked. Contrary to the provisions of the Fourteenth Amendment, and to the decisions of this Court, the complaining judges asserted the power to punish petitioners in a proceeding the very nature of which has been condemned by this Court. The procedure they invoked was repugnant to the guaranty of a free press contained both in the state and federal constitutions. The convictions resulting should have been set aside by the Supreme Court of Florida in harmony with this Court's decisions. Its judgment affirming the convictions below is repugnant to the constitutional guaranties and should be reviewed by this Court.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT R. MILAM,
E. T. MCILVAINE,
Greenleaf Building,
Jacksonville 1, Florida

EDWARD E. FLEMING,
Ingraham Building,
Miami 32, Florida,

ELISHA HANSON,
729 15th Street, N. W.,
Washington 5, D. C.,

Attorneys for Petitioners.

APPENDIX

Constitutional Provisions Involved

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 13 of the Declaration of Rights of the State of Florida provides that:

> "Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the press."

Statutory Provisions Involved

Section 2.01, Florida Stats. 1941, is as follows:

> "2.01. Common Law and certain statutes declared in force.—The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force

in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state."

Sections 38.22 and 38.23, Florida Stats. 1941, read as follows:

"38.22. Power to punish.—Every court may punish contempts against it, but the punishment imposed by a justice of the peace shall not exceed twenty dollars fine or twenty-four hours imprisonment."

"38.23. Contempts defined.—A refusal to obey any legal order, mandate or decree, made or given by any judge either in term time or in vacation relative to any of the business of said court, after due notice thereof, shall be considered a contempt, and punished accordingly. But nothing said or written, or published, in vacation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt."

Sections 64.11 and 64.12, Florida Stats. 1941, read as follows:

"64.11. Abatement of nuisance; parties, by whom maintained.—Whenever any nuisance as defined in Sec. 823.05 is kept, maintained or exists, the state's attorney, county solicitor, county prosecutor, or any citizen of the county through any attorney he may select, may maintain his action by a bill in chancery in the proper court in the name of the State of Florida upon the relation of such attorneys or citizen to enjoin said nuisance, the person, or persons conducting or maintaining the same and the owner or agent of the building or ground upon which said nuisance exists."

"64.12. Abatement of nuisances; temporary injunctions.—In such action the court, judge or court commissioner before whom the bill may be brought may upon proper proof being made allow a temporary writ of injunction without bond. If it shall appear to the

satisfaction of the court, judge or court commissioner *by evidence or by affidavit* that a temporary injunction shall issue, the court, judge or court commissioner may in his discretion pending the determination of the bill of a final hearing enjoin (1) the conducting or maintaining of a nuisance; (2) the operating and maintaining of the place or premises where the nuisance is conducted or maintained; (3) the owner or agent of the building or ground upon which the nuisance exists; (4) and the conduct, operation or maintenance of any business or activity operated or maintained in the building or on the premises in connection with or incident to the conducting or maintenance of the nuisance. Such injunction order shall definitely specify the activities enjoined and shall not preclude the operation of any lawful business not conducive to the maintenance of the nuisance complained of. At least three days notice in writing shall be given defendant or defendants of the time and place of application for said temporary injunction." (Emphasis supplied.)

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 473

JOHN D. PENNEKAMP AND THE MIAMI HERALD PUBLISHING COMPANY,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE PETITIONERS

ROBERT R. MILAM,
E. T. MCILVAINE,
Greenleaf Building,
Jacksonville 1, Florida;
EDWARD E. FLEMING,
Ingraham Building,
Miami 32, Florida;
ELISHA HANSON,
729 15th Street, N. W.,
Washington 5, D. C.,
Attorneys for Petitioners.

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IN THE

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Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE PETITIONERS

Opinions Below

The judgment of guilt in contempt entered by the Circuit Court of Dade County, Florida (R. 142-145) is unreported.

The opinion of the Supreme Court of Florida (R. 152-172) is reported as *Pennekamp et al. v. State*, 22 So. (2d) 875.

Jurisdiction

The jurisdiction of this Court rests upon Section 237(b) of the Judicial Code as amended (43 Stat. 937, 28 U. S. C., Sec. 344(b)).

Petition for writ of certiorari was filed October 1, 1945, and granted November 5, 1945.

Constitutional and Statutory Provisions Involved

The constitutional provisions involved are the First and the Fourteenth Amendments to the Constitution of the United States and Sec. 13 of the Declaration of Rights of the State of Florida.

The statutory provisions involved are Sec. 2.01 of the Florida Statutes of 1941 incorporating the Common Law of England down to July 4, 1776, where not inconsistent with the Constitution and Laws of the United States and the acts of the Florida Legislature, into the laws of Florida and Secs. 38.22 and 38.23 of the Florida Statutes of 1941 defining contempt of court. Also Secs. 64.11 and 64.12 of the Florida Statutes of 1941.

For the convenience of the Court the constitutional and statutory provisions are set forth in the Appendix attached to this brief.

Question Presented

Whether in a contempt proceeding instituted by state court judges for the purpose of punishing a newspaper and its associate editor for publishing editorials and a cartoon that annoyed the judges, state courts are required to follow the rule laid down by this Court for all courts, state and federal and including this Court, that there must be shown a clear and present danger of high imminence to the administration of justice by the court before there can be a judgment of guilt with resultant punishment.

Statement of the Case

This writ of certiorari brings up for review an opinion of the Supreme Court of Florida (R. 152-172) affirming (two justices dissenting) a judgment of the Circuit Court of

Dade County, Florida (R. 142-145), convicting the petitioners, John D. Pennekamp and The Miami Herald Publishing Company, of contempt for the publication of two editorials (R. 6-9) and a cartoon (R. 8a).

A brief statement of the matters involved giving the ultimate facts was contained in the petition for writ of certiorari. Below these same facts are set forth in more detail with appropriate references to the record.

A. The Citation

On November 10, 1944, the Judges of the Circuit Court of Dade County, Florida, issued a citation charging the petitioners with having published two editorials and a cartoon (R. 1-9), which, the citation charged, imputed that the Judges gave effect to every technicality of the law to block, hinder, embarrass and nullify prosecution. The citation recited that "there were pending in said Court on said date divers cases both at law and in equity involving many questions of law" (R. 1) and charged that these publications "tend to create a distrust for said court and the judges thereof in the minds of the people of this county and state and tend to prevent and prejudice a fair and impartial action of said Court and the Judges in respect to the said pending case."

The citation then set forth three counts, as follows (R. 1-6):

(A) Rape Cases: Wherein it was alleged (R. 2-3) that a motion to quash had been granted in one rape case and the Assistant State Attorney then admitted in open court that similar indictments in other cases "were so defective as to make it advisable that the State not go to trial." Thereupon the citation charged (R. 3) the respondents with having "wilfully or wantonly withheld the full truth from the public . . . by failing to state the act of the

State Attorney's Office" admitting the indictments to be defective. The citation further sought to apply the cartoon to these Rape Cases as representing that the State was not being heard and the defendants were being favored.

(B) BROOK CLUB CASE: Wherein the citation alleged (R. 3-5) that a proceeding to abate a nuisance (gambling) maintained by the Brook Club had been pending and the State Attorney had allowed the time for taking testimony to expire without taking it and upon ample notice to the State Attorney a final decree of dismissal was entered on October 31, 1944. The citation alleged falsity in the editorial in omitting to state that "notice (7 days)" was given to the State Attorney of the final hearing, and in stating that the case appeared "out of blue sky" before Judge Wiseheart. The citation then sought to apply the cartoon also to the Brook Club case. It further charged that the second editorial of November 7, 1944 (R. 9) had emphasized these misleading misrepresentations.

(C) TEEPEE CLUB CASE: Wherein it was alleged (R. 5-6) that the Teepee Club case, brought by the State Attorney to abate a nuisance (gambling) was then pending and that the editorial, after mentioning a denial of temporary injunction because affidavits were relied upon to support the application, stated that while this might be good law and exact judicial evaluation of the Statutes it was, however, the character of legal interpretation which caused people to raise questioning eyebrows and shake confused heads in futile wonderment. The citation sought to apply the cartoon also to this case.

Finally the citation charged (R. 5-6) as to these three Counts that the editorials and cartoon represented to the general public that the judges had not discharged their duties honorably and fairly in respect of these cases, "all of which tends to obstruct and interfere with the said Judges

as such in fairly and impartially administering justice and in the discharging of their duties * * *" (R. 6).

No allegation is to be found anywhere in the citation that either of the editorials or the cartoon created a clear and present danger of high imminence to the fair and impartial administration of justice in pending cases before either of the judges signing the citation.

Petitioners were commanded to appear at 10:00 A. M., November 28, 1944, to show cause why they should not be held and adjudged to be in contempt.

B. The Answer and Exhibits Thereto

On the return day, November 28, 1944, petitioners filed their return under oath (R. 9-19) in which was embodied a motion to quash the citation. The grounds of the motion (R. 9-10), inter alia, were that the publications were not contemptuous but constituted legitimate criticism within the protection of the State and Federal Constitutions; and that the publications presented no clear and present danger to the administration of justice. The return (R. 10) stated that the editorials were intended to be, and in fact were, published in the interest of orderly and fair administration of justice as set out in affidavits attached to and made a part of the return (R. 47-57).

From these exhibits and the answer the following facts appear:

Rape Cases: The petitioners by the answer denied that the Assistant State Attorney had admitted the several indictments in these Rape Cases to be defective and averred that instead the State Attorney had stated, in effect, that he believed the indictments to be in proper form but inasmuch as the Grand Jury was still in session and in order to eliminate any question he would have the defendants reindicted. Respondents denied withholding the truth or any

intention so to do and denied that the cartoon was intended to, or could apply to the Rape Cases (R. 10-12). It further appeared that five indictments for rape had been returned and filed against eight defendants (R. 55). In one of the cases the defendant filed a motion to quash the indictment (R. 55) for an alleged error, due to scrivener's mistake. There was no mention in the then minutes of the court of the Assistant State Attorney agreeing that the indictments were so defective as to make it advisable not to go to trial.[1]

The minutes of the Circuit Court, as later written up and expanded under the court's direction, stated that the Assistant State Attorney "approved" quashal of the indictments (R. 137). The only minutes in existence at the time the editorial was published did not support the court's citation. The corrected minutes were not in existence at the time the editorial was published.

The charge in the citation against the respondent with respect to these rape cases was "failing to state the act of the representative of the State Attorney's office" (R. 3). Entirely new matter was interjected by the court after the trial closed on November 28th. On December 15th, the court filed its findings of fact, stating that "The respondents

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[1] It is significant in this respect that petitioners in the citation for contempt are accused of willfully and wantonly withholding the full truth from the public and failing to fairly report the action of the court and the judge thereof in respect of said indictments by stating only "that 'Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn' withholding the truth by failing to state the act of the representative of the State Attorney's office." The minutes of the court made on the day the motion to quash was granted, *did not show any concurrence* in the motion by the representative of the State Attorney's office (R. 55). The minutes were subsequently modified by Judge Barns to show such concurrence (R. 137). The Assistant State Attorney present at that time in an affidavit filed for use in the Supreme Court of Florida (in support of the petitions for a writ of certiorari there) denied concurring in the motion. The Miami Herald published a factual story concerning the reindictment of the defendants when they were reindicted. (See footnote *infra*, p. 19.)

did not report to the public that within twenty-four hours after the indictments against eight defendants were found defective • • • has been corrected by a Grand Jury, the prisoners had been arraigned by the court and their cases set for trial by the court, but instead respondent withheld all these facts" (R. 135).

Thus, in these "findings of fact" filed 35 days after the citation issued and 17 days *after the contempt trial* (R. 135), the respondents are for the first time charged with *failure to report to the public* that within twenty-four hours after quashal of the indictments (1) the defendants had been re-indicted; (2) the defendants had been arraigned by the court, (3) their cases had been set for trial. Respondents were not charged in the citation (R. 2) with any such things and were never confronted with the necessity of disproving them.[2]

The editorial complained of concerned the quashed indictments. These indictments had then been disposed of finally. No matter with respect to the quashed indictments was pending. There was no comment or criticism concerning the handling of the new indictments.

Brook Club Case. Answering (R. 12-14) the charge concerning the Brook Club Case, petitioners denied that the case was pending and showed that it had been terminated by final decree of dismissal. They denied that no testimony had been taken, and showed that adversary evidence had been taken before the court, as recited in the court's order of April 25, 1944, granting the temporary injunction. The answer then set forth that the State Attorney, upon receiving notice of the final hearing, notified the court and opposing counsel that he would be engaged before the Grand Jury on the date set for hearing and requested extension of time. The petitioners denied any intent by the editorials or the

[2] See footnote p. 19.

cartoon to interfere with fair and impartial justice; on the contrary, they averred an intent to condemn and criticise the system of pleading and practice and procedure created by the laws whereby causes of public importance could be long delayed and then after such delay dismissed on technical grounds.

There were in reality *two* Brook Club cases. The affidavit of Jeanne Bellamy Bills attached to the answer to the citation (R. 50-57)[3] reveals the following facts: Bill of complaint was originally filed in 1940 (R. 103) by three public officials, the Attorney General of Florida, the State Attorney of Dade County, and the County Solicitor, seeking to have the Brook Club abate the nuisance of conducting a gambling house. Three agents of the Federal Bureau of Investigation made affidavits supporting the bill and stating that the information was furnished to the Attorney General of Florida upon the request of the Director of the Federal Bureau of Investigation (R. 51).

On February 27, 1940, the defendants in this first Brook Club case filed their answer under oath, admitting the operation of a gambling house at the Brook Club and making these significant confessions (R. 52-53):

> "This defendant cannot truthfully disclaim or deny knowledge by it of the facts herein admitted. On the contrary, this defendant, believing that, because of the apathy or sympathy of the local community in which its club is situated and of Dade County generally, the statutes prohibiting gaming would not be strictly enforced by officers of the law, encouraged and cooperated with the operators of the gambling room in the said building. • • •

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[3] While certified copies of the records in the Brook Club case and the Teepee Club case were filed in evidence at the trial (R. 66-126), the ultimate facts were set forth in the affidavit of Jeanne Bellamy Bills attached to the return and these allegations were not controverted.

"This defendant believed, at the time it consented to and encouraged the use of a portion of its premises for gaming purposes, that it was supplying the demand of a large majority of the inhabitants of the community for well conducted and regulated gambling restricted to persons who could afford and wished, as a pleasurable diversion in the nation's winter playground, to engage in the playing of roulette and other games of chance. This defendant, however, became thoroughly convinced, prior to the institution of this suit, that the Sheriff of Dade County, Florida, and his deputies would no longer tolerate or permit illegal gaming on this defendant's premises or elsewhere in Dade County."

Having thus attempted to purge themselves by confession, they promised in the future to abstain from gambling and protested that the nuisance having been thus abated further proceedings were unnecessary (R. 53).

On February 27, 1940, the selfsame day the answer was filed, Judge Barns accepted the protestation of the Brook Club that no further gambling would be permitted and denied the temporary injunction and stayed further proceedings during the promised good behavior, but retained jurisdiction (R. 53).

On April 28, 1941, 14 months later, a new Attorney General of Florida moved to withdraw as a relator in the case on the ground that the Attorney General, being a State officer, should not inject himself in matters pertaining to local government when it was not shown that local law enforcement had failed (R. 53).

On May 12, 1941, Judge Barns entered an order reciting the statements in the Attorney General's motion, stating that it was necessary to have both plaintiff and defendant in litigation, that the plaintiff had withdrawn, that there remained no plaintiff in the suit, and that therefore the case should be and was thereby dismissed (R. 54). Thus

the threat of immediate restraint hanging over the Brook Club by reason of its admission of law violations and the retention of jurisdiction by the court was removed.

Both the State Attorney and the County Solicitor remained as relators in this suit, although the court recited there was no party plaintiff remaining. The Florida Statute under which this case was brought provided that the State's Attorney, the County Solicitor or any citizen of the County might maintain "in the name of the State of Florida" such a suit to enjoin the nuisance of gambling (Sec. 64.11, Florida Statutes 1941, quoted in appendix hereto).

Second Brook Club Case. On March 22, 1944, the State's Attorney (not the Attorney General) filed a second suit against the Brook Club to abate a renewed outburst of gambling there (R. 99). The bill of complaint (R. 99-105) recited in detail the former suit and that the promise to abstain from gambling was "utterly worthless" and had been flagrantly violated.

The case was heard by Judge Holt on motion to dismiss, urging that the Circuit Court was without jurisdiction to grant an injunction unless it was shown that law enforcement officials other than the State Attorney were not enforcing the law (R. 113-114). This motion was denied (R. 115-116).

On April 20, 1944, after various postponements, the case came on before Judge Holt on hearing for temporary injunction. Testimony was taken in open court. Witnesses appeared, were sworn and testified (R. 55). On April 25, 1944, temporary injunction was granted (R. 121). The court in its order recited that it had "considered the evidence submitted by the Plaintiff, none having been offered by the defendants" (R. 121).

On May 1, 1944, answer was filed (R. 122-124) wherein

it was admitted that there was some gambling at the Brook Club, but alleging it was only sporadic. The defendants admitted the acts of gambling proven by witnesses on the hearing—denied gambling at any other time.

On August 14, 1944, the defendants moved for a decree on pleadings because no testimony had been taken (R. 124-125).

On October 24, 1944, the solicitors for The Brook Club, Inc. served upon the State's Attorney notice that they would call up the case before Judge Wisecart (not Judge Holt to whom the case was assigned and who had taken the testimony on temporary injunction), on October 31, 1944, for argument and disposition (R. 125-126). Thereupon, the State Attorney "immediately notified" both the secretary to Judge Wisecart and the counsel for the Brook Club that the Grand Jury was reconvening on October 30, 1944 (the day before the hearing set), and that the State Attorney would be constantly engaged from day to day until the Grand Jury was discharged early in November (R. 12). The State Attorney requested that this hearing be deferred until the Grand Jury recessed (R. 13). On October 31st, notwithstanding the State Attorney was then engrossed in his duties before the Grand Jury, the case was heard in his absence and dismissed by final decree (R. 13). The reconvening of the Grand Jury had been fixed long before this notice was given, and the time of the State Attorney—who was personally handling the Brook Club case (R. 12) had been committed to the work before the Grand Jury.

The case had been finally disposed of by the decree of dismissal on October 31st, two days before the first editorial and seven days before the second editorial was published.

The findings of fact filed by the Circuit Judges on December 15th, 1944 (R. 135) were, as to the Brook Club case, meager—they recited some, but by no means all, of the

material facts appearing in the record and set out above, and denominated the editorials "semi-factual". Such findings of fact state that (1) Judge Wiseheart dismissed the suit "the State Attorney not making any motion for continuance or postponement of the hearing," and that (2) the Brook Club case "was never further prosecuted by the State Attorney as was his privilege if he deemed it advisable."

TEEPEE CLUB CASE: Answering (R. 14-15) the charge in the citation concerning the Teepee Club case, petitioners denied making any false imputation or representing by the cartoon that the public was not being favored, and averred an intent instead to criticise the system of pleading and practice. They alleged that the editorial referred to an order signed by Judge Holt on October 4, 1944, denying a temporary injunction and that such matter was no longer pending.

The Teepee Club case was another suit to enjoin the operation of a gambling house. The history of the Teepee Club appears in the record as follows (R. 66-91):

During the year and more preceding September, 1944, there had been two convictions for using the Teepee Club for the operation of a gambling house.

One defendant arrested a year before for conducting gambling on the premises had not yet been brought to trial.

On September 18, 1944, deputy sheriffs raided the premises and took the names of some nineteen persons, employees and patrons. The officials observed there the usual paraphernalia for race track gambling.

On September 21, 1944, various of these persons were brought before the State Attorney, sworn, testified and made affidavit to the conducting of gambling upon the premises.

On September 23, 1944, the State's Attorney filed bill of complaint to enjoin the use of the premises for gambling. All of the above facts and others were recited therein (R. 66).

On October 11, 1944, hearing for temporary injunction was had before Judge Holt. Various witnesses appeared and testified orally, albeit unwillingly and evasively (R. 72-90). The main defendant refused to testify as tending to incriminate him. The State Attorney in addition introduced the transcript of testimony of six witnesses theretofore examined by him under oath, five of whom had signed and sworn to their transcripts (R. 72).

On October 11, 1944, Judge Holt made an order denying the application for temporary injunction (R. 91-92) and castigated the State Attorney for submitting and using affidavits. Judge Holt assailed the dependability of affidavits and in his order said:

> "The defendant cannot cross-examine an affidavit. The Court cannot determine who is testifying and whether reliance can be placed upon such testimony. The manner and demeanor of the witness while testifying is lacking.
>
> "It is an old saying (and a true one) that 'anybody will sign an affidavit' and 'you can prove anything by an affidavit.' The fact that such affidavits were taken before the State Attorney does not give them any additional weight or value. It would be a vicious and unfair practice to take property upon such proof, (if it can be called such)."

On October 11, 1944, the State Attorney filed a motion for reconsideration (R. 93). With respect to the Court's denial of the right to use affidavits the petition stated:

> "While numerous other difficulties seemed to have been encountered by the State in the past on applications to suppress gambling houses as statutory public

nuisances, so far as can be ascertained this is the first instance in which the use of affidavits has been assigned as a reason for refusing to enjoin."

On October 12th the court denied this petition for reconsideration (R. 98).

The sworn answer of the petitioners filed below stated (R. 15):

(a) "It has long been the practice both by common usage and by practice in the State of Florida to sustain and grant temporary injunctions and receiverships solely upon affidavits."

(b) "The judge in refusing to consider the affidavits submitted in support of the application for said injunction was acting contrary to the practice usually pursued in such cases."

Section 64.12 Florida Statutes 1941, with respect to this class of injunction to abate nuisances reads as follows:

"If it shall appear to the satisfaction of the court, judge or court commissioner by evidence or *by affidavit* that a temporary injunction shall issue, the court, judge or court commissioner may in his discretion . . ." (Emphasis supplied.)

On November 2nd, concerning this ruling in the Teepee Club case, the editorial stated (R. 8) as follows:

"On Oct. 10 Judge Holt had before him a suit by the state to abate a nuisance (bookmaking) at the Teepee Club.

"Five affidavits of persons who allegedly visited the premises for the purpose of placing bets were introduced by the state over the objection of the defendants.

"Judge Holt ruled them out, explaining in denying the injunction against the Teepee Club:

"'The defendant cannot cross-examine an affidavit. The court cannot determine who is testifying and whether belief can be placed upon such testimony . . .

> The fact that such affidavits were taken before the State Attorney does not give them any additional weight or value.'
>
> "This may be good law, exact judicial evaluation of the statutes. It is, however, the character of legal interpretation which causes people to raise questioning eyebrows and shake confused heads in futile wonderment."

When this editorial was published, the matter of the temporary injunction was no longer pending.

The Grand Jury Report

Three days after the issuance of the citation for contempt the Grand Jury of Dade County, Florida, filed its report, which report was attached to the answer of the defendants in the contempt proceedings (R. 19-47). The insistence of the Miami Herald and its editor that law enforcement needed drastic improvement is borne out by this Grand Jury's report covering the period discussed by the editorials. The judges below who cited these respondents brushed off the Grand Jury's report in their judgment of guilt with the following comment:

> "The subsequent Grand Jury report can not avail the respondents anything since it is in no wise related to the subject-matter of the editorial and cartoon; to-wit, judicial acts, and also because the report was made many days after the publication of the editorials" (R. 143).

The sworn response to the citation filed in the Circuit Court stated that general law enforcement in Dade County had broken down and had been subjected to wide-spread public comment and criticism; and it thereby became the right, if not the duty, of newspapers and other vehicles of public information to comment upon such a situation. It stated that this deplorable condition with respect to law

enforcement existed at the time the editorials were issued and that "this general situation and public concern therewith is reflected in the report of the grand jury," dated November 13, 1944. It invoked the Grand Jury's report as proof of the condition that the Miami Herald and its associate editor, Mr. Pennekamp, sought to have remedied (R. 15-16). The answer then commented upon the findings in the Grand Jury report which were true at the time the editorials were published and to which general condition of lawlessness the editorials were directed. The Grand Jury report showed, for instance, that gambling in Dade County had become an organized industry and that protection was afforded the so-called big operators, notorious for the vicious control that they exercised by lawless means over this undercover industry and for their baneful influence on law enforcement officers.

The Grand Jury report showed that the Grand Jury had called upon the county solicitor to furnish data on all cases handled by him for a 2-year period, which data he refused to give. The Grand Jurors then determined from the public records that in this 2-year period evidence in 132 felony cases was submitted to the county solicitor. The disposition of these 132 cases was as follows:

55 cases were dismissed, neither court nor jury passing upon the guilt or innocence of the accused.
5 were tried and acquitted.
70 either pled guilty or were tried and found guilty, none being sentenced to any imprisonment, but paying fines averaging less than $200.00.
2 were tried, found guilty and sentenced to six months' imprisonment.

Relevant provisions of the Grand Jury report were set forth in the response itself. The so-called "liberal policy" of law enforcement (such as relied upon by the operators of the Brook Club) permitting gambling and other forms of

vice to operate was indicted and criticized in the report. The Grand Jury report stated that the laws generally "are all in favor of the criminals * * * there are entirely too many loopholes." It invoked the interest of citizens generally to take an active and sustained interest in this matter in order that first-hand information be given the public, so that the public conscience be aroused to the end that the deplorable situation might cease.

The Several Orders of the Circuit Court

The Circuit Court staggered its decision over a period of nearly a month by making separate orders on different phases of the case. In all three orders were issued:

I. On December 9, 1944, the judges entered an order denying the motion to quash the citation (R. 127). Therein the judges found that the court had been criticised for deciding points of law in cases adverse to the State Attorney and that the newspaper had made an unfair and untrue report and false imputations based upon such unfair and untrue report. The court denied that it was necessary that the citation allege a clear and present danger and, in effect, held that alleging a "tendency" was the same as alleging the existence of a "clear and present and imminent danger." The court further cited Section 2.01, Florida Statutes, 1941, and held that as to contempt by publications out of the presence of the court the common law prevailed. And the court held that the cases were pending because they were still open for modification or rehearing.

II. On December 15, 1944, the judges made an order entitled "Findings of Fact" referring to all three cases (R. 133):

> (a) As to the RAPE CASES—A photostatic copy of the Court Minutes of October 30, 1944 (R. 137), stating that the Assistant State Attorney "*approved*" the

granting of the motion to quash was attached to the Findings of Fact. The court found that within twenty-four hours new indictments were returned and the cases reset for trial. The court found that the respondents applied the cartoon to the Rape Cases and failed to report to the public the reindictments and resetting of the Rape Cases.

(b) As to the BROOK CLUB CASE, the findings set forth that the case became at issue on May 11, 1944 but was never further prosecuted by the State Attorney and was dismissed, the State Attorney not making any motion for postponement. It found that the editorial was "semi-factual."

(c) As to the TEEPEE CLUB CASE, the findings did not state anything to be false but stated that the court's order in this case contained the exact language quoted in the editorial.

III. On December 18, 1944, the judges entered an order entitled "Judgment of Guilt in Contempt" (R. 142). With respect to the answer it was held that wherein it was inconsistent with the court records, the records would prevail; that the editorials were unambiguous and the response would therefore be ignored; that the Grand Jury report could not avail the petitioners because made after the publication; and that the affidavits attached were also unavailing for the same reasons. It was held that the newspaper did in fact misinform the public about the court's proceedings and thereupon the respondents were convicted of contempt for making an unfair and untrue report of court proceedings and unfair and untrue imputations based thereon. Fines were assessed against John D. Pennekamp for $250.00 and against The Miami Herald Publishing Company for $1,000.00 and provision made for issuance of execution.

Opinion of the Supreme Court of Florida

Appeal from the judgment of the Circuit Court of Dade County was duly filed in the Supreme Court of Florida, where a hearing was held by the full Court on May 4, 1945.

On July 24, 1945, the Supreme Court of Florida by a five-to-two opinion affirmed the judgment of contempt entered by the Circuit Court (R. 152).[4]

The Supreme Court of Florida divided on the issue as to whether the decision of this Court in the case of *Bridges* v. *California*, 314 U. S. 252 (1941), is binding upon the courts

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[4] NOTE. Out of an abundance of caution, the case was taken from the lower court to the Florida Supreme Court both on certiorari. (*John D. Pennekamp and The Miami Herald Publishing Company, Petitioners*, v. *The Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, Respondent*) and by appeal (*In re; John D. Pennekamp and The Miami Herald Publishing Company, Appellants.* The preferable procedure in the opinion of petitioners' counsel was by certiorari.

The records on appeal and by certiorari in the Supreme Court of Florida were identical except that attached to petition for writ of certiorari were the following exhibits not appearing in the appeal record:

1. Photostatic copy of the minutes made by the Clerk of the Circuit Court in Dade County at the time of the ruling (Ex. 1) on the rape indictments which made no reference to any alleged agreement by the State's Attorney that the original rape indictments were defective or consent by the State's Attorney that they be dismissed, the matters charged in the citation and in the judgment as a wilful suppression of fact. These were the only minutes that existed when the editorial was published.

2. Photostatic copy of the minutes of the Circuit Court as later expanded at the direction of Judge Barns after the publication of the editorial and cartoon (Ex. 2) to state there was such an agreement and consent by the State's Attorney.

3. Affidavit of Assistant State Attorney (Ex. 3) stating that he did not concede that the indictments in the rape cases were defective but, because the Grand Jury was still in session and to obviate any question, he would have new indictments returned.

4. Photostatic copy of newspaper item in the Miami Herald of November 1st stating the rape defendants had been duly reindicted and arraigned for trial (Ex. 4).

Although certiorari or habeas corpus had theretofore been the accepted method of review, the Florida Supreme Court ruled on February 27, 1945, that appeal was in this case the proper method.

of Florida. The majority opinion held that the rule, laid down in the *Bridges* case was not applicable to this case stating in part:

> • • • *we find nothing in the Bridges case indicating a purpose to supersede state law and decisions on the question or to require state courts to conform to Federal pattern.* (R. 165.)
>
> "It necessarily follows that the only question that can properly be raised here goes to the reasonableness, arbitrariness, or the discriminatory character of the contempt judgment or the Florida law under which it was imposed. This question appellants have by-passed and have elected to stand on their immunity from punishment under the Fourteenth Amendment.
>
> "If appellant's theory that the judgment appealed from abridges their liberty of the press as guaranteed by the First and Fourteenth Amendments to the Federal Constitution is pursued to its ultimate conclusion, it necessarily follows *that the power of the States in the premises is abrogated.* We do not think the Bridges case is susceptible to that interpretation. We think that the reservations to the States in the Tenth Amendment are still vital, that State Courts still have the power when properly authorized to punish for contempt and *if not unreasonably or arbitrarily exercised*, their judgments will be upheld. We have examined the editorials and the telegram involved in the Bridges case and we find nothing in them assaulting the integrity of the court. They would not have been contemptuous under the rule in the Hayes case (R. 166).
>
> "The ultimate test in the Bridges case requires that the 'Substantive evil must be extremely serious and the degree of imminence extremely high before the utterances can be punished'. Even if this test is to the rule in the State Courts, they are authorized to apply it by their own law and standards and unless the application is shown to be arbitrary and unreasonable, their judgment should not be disturbed. • • •

"We therefore hold that the cartoon and the editorials afford ample support for the judgment imposed and that the issues were *properly adjudicated under* Florida law. We do not think that the rule in the Bridges case is applicable but if for any reason it may be held to be the judgment is still free from error because it is not charged that it was applied in an arbitrary or unreasonable manner and if it were, there is no showing to that effect. We do not think freedom of the press can be exercised in a way to vitiate fair and impartial trial nor do we think that it can be employed to harass the court in total disregard of approved standards of propriety when the rights of others to the case are adversely affected" (R. 170-171). (Emphasis supplied.)

A dissenting opinion filed by Mr. Associate Justice Buford and concurred in by Mr. Associate Justice Sebring declared there was nothing in either of the editorials or cartoon which

"imputes a want of fairness, impartiality or integrity to any Judge or any Court. Nor do they appear to have for their purpose or intent the influencing or controlling the determination of the result in any particular case *then pending* in any court. They appear to adversely criticise a judicial system which, to protect the rights of the righteous must, by the same token, see that the alleged rights of the unrighteous are determined." (R. 171.)

The dissent further stated:

"* * * I think the Bridges case is binding and that in the absence of showing of *clear* and *present danger* of influencing or controlling the determination in any particular case, then pending in any court, created by the publication complained of, no punishable contempt is made to appear." (R. 172.) (Emphasis as it appears in dissenting opinion.)

Specification of Errors Urged

The Supreme Court of Florida erred:

1. In holding, contrary to the decision of this Court in the *Bridges* case, that the common law rule or statutory rule of Florida governed in determining that publications could be summarily punished as contempt of court without a showing of clear and present danger of high imminence to the administration of justice.

2. In arbitrarily and capriciously affirming the judgment of conviction based upon a mere allegation of tendency to interfere with the fair and impartial administration of justice, when, under the decisions of this court in the *Bridges* and other cases a conviction could be sustained only upon proof of a clear and present danger of high imminence.

3. In holding that the cases discussed were pending and as such were not subject to editorial comment in the manner commented upon by petitioners.

4. In holding that the convictions affirmed do not violate the constitutional guaranty of a free press.

5. In affirming the judgment of the Circuit Court of Dade County, Florida.

Summary of Argument

Point 1. The decision of the Supreme Court of Florida, upholding the conviction of petitioners for contempt in a proceeding based upon an allegation that petitioners' utterances merely tended to prevent and prejudice a fair and impartial action of the court and the judges thereof, is in conflict with the decision of this Court in *Bridges* v. *California*, *supra*, and with state and federal court decisions adhering to the test laid down in the *Bridges* case. In effect

the Supreme Court of Florida has challenged the application of the *Bridges* case to contempt proceedings instituted by judges in that state and has ruled that such proceedings are properly settled under the laws of Florida without reference to the holding of this court. If the decision of the Florida Supreme Court is not set aside by this Court then the whole purpose of the *Bridges* case to lay down a test applicable to both state and federal courts will have been defeated.

Point 2. The record in this case shows that the citation upon which hearing was held with the resulting conviction of petitioners, which conviction was affirmed by the Supreme Court of Florida, nowhere alleged that the acts of petitioners created any clear and present danger of high imminence to the fair and impartial administration of justice. The decision, therefore, is in conflict with the decision of this Court in *Bridges* v. *California, supra; Nye* v. *U. S.*, 313 U. S. 33 (1941); and *Near* v. *Minnesota*, 283 U. S. 697 (1931).

Point 3. The record is indisputable that none of the cases discussed in the editorials was pending before the court at the time the editorials and cartoon were printed. *Craig* v. *Hecht*, 263 U. S. 255 (1923); *People of Virgin Islands* v. *Brodhurst*, 148 F. (2d) 636 (C. C. A. 3rd, 1945); *State ex rel. Pulitzer Co.* v. *Coleman*, 347 Mo. 1238, 152 S. W. (2d) 640 (1941); *Ex Parte Earman*, 85 Fla. 297, 95 So. 755, (1923); *Nixon* v. *State*, 207 Ind. 426, 193 N. E. 591 (1935).

Point 4. The holding of the Supreme Court of Florida that the convictions affirmed do not violate the constitutional guaranty of a free press is in conflict with the decisions of this Court in *Near* v. *Minnesota, supra; Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Cantwell*

v. *Connecticut*, 310 U. S. 296 (1940); *Bridges* v. *California*, *supra*; *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Thomas* v. *Collins*, 323 U. S. 516 (1945). Each of these cases related in one way or another to restraint of free speech or the free press. Each of them held that these liberties cannot be restrained. This Court has held that such subsequent punishment for abuses as may exist (but not contempt) is the appropriate remedy consistent with constitutional privilege. The procedure invoked by the Circuit Court judges in this case resulting in the conviction as affirmed by the Supreme Court of Florida is repugnant to the guaranty of a free press.

ARGUMENT

Point I

The decision of the Supreme Court of Florida in this case is in conflict with the decision of this Court in Bridges v. California, supra, and with state court and federal court decisions adhering to the test laid down in the Bridges case.

In *Bridges* v. *California*, *supra*, this Court measured a power of all American courts, both state and federal. It said that the possibility of disrespect for the judiciary as the result of the published criticism of a judge is not such a substantive evil as will justify impairment of the constitutional right of freedom of speech and press.

For all time it disposed of the contention that the English common law is applicable on questions concerning liberty of speech and the press.

Further it reaffirmed the decision in *Nye* v. *United States*, *supra*, overruling *Toledo Newspaper Company* v. *United States*, 247 U. S. 402 (1918). The *Toledo* case applied the reasonable tendency test. The *Nye* case ruled flatly that

courts have power to punish for contempt only where there is a clear and present danger of high imminence.

A tendency to obstruct was all that was alleged in the citation directed to petitioners. It was upon that charge and that charge alone they were convicted and their conviction affirmed by the Supreme Court of Florida.

The Supreme Court of Florida in its opinion in addition to challenging this Court's decision in the *Bridges* case also challenged this Court's holding that the Fourteenth Amendment prohibits infringement by state legislatures of those rights and liberties guaranteed against infringement by Congress in the federal constitution (R. 166). After so asserting its challenge, the Florida Court said:

> "It necessarily follows that the only question that can properly be raised here goes to the reasonableness, arbitrariness or the discriminatory character of the contempt judgment or the Florida law under which it was imposed. This question appellants (petitioners herein) have by-passed and have elected to stand on their immunity from punishment under the Fourteenth Amendment" (R. 166).

The court concluded its opinion by saying:

> "We therefore hold that the cartoon and the editorials afford ample support for the judgment imposed and that the issues were properly adjudicated under Florida law. We do not think that the rule in the Bridges case is applicable but if for any reason it may be held to be the judgment is still free from error because it is not charged that it was applied in an arbitrary or unreasonable manner and if it were, there is no showing to that effect. We do not think freedom of the press can be exercised in a way to vitiate fair and impartial trial nor do we think that it can be employed to harass the court or in total disregard of approved standards of propriety when the rights of others to the cause are adversely affected" (R. 171).

Two judges of the Florida Supreme Court refused to concur in the decision. In a dissenting opinion they said—

> "• • • there is nothing in either (the editorials and cartoon) which imputes a want of fairness, impartiality or integrity to any Judge or any Court. • • • They appear to adversely criticise a judicial system which, to protect the rights of the righteous must, by the same token, see that the alleged rights of the unrighteous are determined" (R. 171).

The dissenting judges insisted the rule in the *Bridges* case is binding and should be applied:

> "• • • I think the Bridges case is binding and that in the absence of showing of *clear* and *present danger* of influencing or controlling the determination in any particular case, then pending in any court, created by the publication complained of, no punishable contempt is made to appear." (Judge Buford, R. 172.)
>
> "I concur with the conclusion reached (by Judge Buford) that the judgment appealed from must be reversed on the authority of Bridges v. California, 314 U. S. 252." (Judge Sebring, R. 172.)

As for the Florida law, it contains no definition of contempt by publication (See Sec. 38.23 of the Florida Statutes of 1941). The Florida statutes do provide, however, that the common law of England down to July 4, 1776, shall be in force in Florida provided it is not inconsistent with the Constitution and laws of the United States and the Acts of the legislature of Florida. (Sec. 2.01 Florida Statutes, 1941).

Thus it was under the ancient English common law that petitioners were cited, convicted and their conviction affirmed by the Florida Supreme Court, in conflict with this Court's decision in *Bridges* v. *California, supra:*

> "The English common law is inapplicable in this country on questions concerning liberty of speech and press." (Headnote 4, *Bridges* v. *California, supra.*)

Since the *Bridges* case was decided, the Florida Supreme Court is the only court that has refused to follow it. The Third Circuit Court of Appeals recognized its force in the case of *People of Virgin Islands* v. *Brodhurst, supra;* and the Supreme Court of Louisiana followed it in *Graham* v. *Jones et al. in re Times-Picayune,* 200 La. 137, 7 So. (2d) 688 (1945).[5]

POINT 2

The action by the Supreme Court of Florida was arbitrary and capricious and should be set aside by this Court.

The action by the Supreme Court of Florida was arbitrary and capricious. It was aimed at enforcing silence in the name of preserving the dignity of the bench. It must be recalled that the editorials and cartoon referred to no matters pending at the time they were published. The Brook Club case had been dismissed by Judge Wiseheart; the Teepee Club case had been effectively disposed of when the application for temporary injunction was denied by Judge Holt; the rape indictments had been quashed by Judge Barns.

The citation did not even allege that the comments of petitioners created any clear and present danger of high imminence to the administration of justice. The Florida Supreme Court recognized this and in so doing it revived the ancient English common law concept of the power of judges to punish summarily for contempt in order to affirm the convictions. It sought to set up one rule for judges; another one for all other public officials who consider themselves injured by newspaper comment.

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[5] Interestingly, this *Times-Picayune* case quoted as an excellent example of the "tendency" rule the Florida Supreme Court case of *Baumgartner* v. *Joughlin,* 105 Fla. 335, 141 So. 185, and then proceeded to point out that such rule had theretofore been the rule in Louisiana but was superseded by rule announced in *Bridges* v. *California, supra.*

What the Florida Supreme Court has done in effect is to say to this Court:

> "In Florida, judges have the right and may exercise the power if they so desire, to punish any one in a contempt proceeding whose comment concerning their activities annoys them. The First Amendment, and the Fourteenth Amendment to the Constitution of the United States do not apply in Florida. The decisions of the Supreme Court of the United States have no binding force and effect upon the courts of Florida."

As against this position this Court has said:

> "• • • The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however, limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect." • • •
>
> "• • • The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting hall, the radio and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases." *Bridges* v. *California, supra,* at pp. 270-271.

As an illustration of the capricious and arbitrary length to which the Florida court went, reference is made to this statement in the majority opinion:

> "We have searched the text books and the cases diligently and we find nothing to support the conten-

tion of one of counsel for appellants that freedom of the press protects him if he chooses to lie about the Court and that the Court can do nothing about it unless he lies in the courtroom or his lying is 'manifested with such a high degree of imminence as to express a high degree of threat.'" (R. 170.)

The record contains no justification for that statement. Counsel made no such contention. Judge Barns in putting a series of questions to counsel as to whether a newspaper could lie about the court with impunity said he asked them without application to petitioners herein and merely academically. Foreseeing, however, that the imputation that The Miami Herald and Mr. Pennekamp had "lied about the court" would arise later in the case (as it did in the "Findings of Fact" of Judge Barns (R. 143, 144) and in the opinion of the Supreme Court of Florida) the implied charge of "lying" was promptly challenged at the trial:

"We submit that there was no such thing" (R. 64);

and counsel stated they wished to bring the case back to the real issue; and that the actual records of the court in these gambling house cases would have justified "even stronger statements than were made" (R. 64). The purpose of the questions obviously was to force counsel into an admission that judges have greater rights than other public officials in respect of criticism of their actions. Counsel's replies were that they have no greater, no lesser rights; and whether the articles complained of were true or false, judges had to respect the constitutional guaranties and avail themselves of the appropriate remedy. No sweeping claim of absolute immunity for the press was advanced. The remedy of subsequent punishment was fairly stated as the one to be applied when abuses actually occurred (R. 58-61).

This Court has held that a judge has no greater and no lesser rights than any other citizen in respect of remedies for libel, slander, and the like. As the late Mr. Chief Justice Taft in his concurring opinion in *Craig* v. *Hecht*, *supra*, said:

> "If the publication criticizes the judge or court after the matter with which the criticism has to do has been finally adjudicated and the proceedings are ended, so that the carrying of the court's judgment cannot be thereby obstructed, the publication is not contempt and cannot be summarily punished by the court, however false, malicious, or unjust it may be. The remedy of the judge as an individual is by action or prosecution for libel." (263 U. S. at p. 278.)

Also, as the late Mr. Justice Holmes said in his dissent in the same case in which the late Mr. Justice Brandeis concurred:

> "A man cannot be summarily laid by the heels because his words may make public feeling more unfavorable in case the judge should be asked to act at some later date, any more than he can for exciting public feeling against a judge for what he already has done." (263 U. S. at pp. 281-282.)

The record in this case demonstrates that the judges who issued the citation were annoyed by the publications of petitioners and, as Mr. Justice Holmes said, attempted to lay petitioners by the heels because of their annoyance. This is forcibly illustrated by the finding of fact that petitioners having published certain information concerning the quashing of the indictments in the two cases "did not report to the public that within twenty-four hours after indictments against eight defendants were found defective * * * (they) has been corrected by the grand jury, the prisoners had been arraigned by the Court and their cases set for trial by the Court, but instead respondents (petitioners here) with-

held all these facts" (R. 135). It is indisputable that petitioners did not withhold any of the facts. As was pointed out in petitioners' petition for certiorari, page 9, petitioners herein reported the fact of the reindictment of the eight defendants in the rape cases after the original indictments had been quashed. This was not denied by the respondent.

But even had petitioners failed to report the facts as to the reindictment of the eight defendants in the rape cases, the complaining judges were without authority to penalize them for that failure. As was stated by Mr. Chief Justice Hughes in *Near* v. *Minnesota, supra:*

> "If the publisher has a right, without previous restraint, to publish them (comment upon public officials or their acts), his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made." (283 U. S. at p. 720.)

The order denying petitioners' motion to quash the citation, the findings of fact made by the judges who issued that citation, and the order finding the petitioners guilty of contempt are conclusive evidence that what the judges in this case sought to do was to control the utterances of petitioners in their newspaper, The Miami Herald. No more deliberate effort to restrain freedom of the press as guaranteed by the First Amendment can be imagined.

There was far more involved here than the Teepee Club, the Brook Club and the Rape Cases. Law enforcement in Dade County had failed miserably. Those violating the law were widely escaping punishment, even indictment. Those accused were with few exceptions either released on artificial defenses or, upon conviction, were being given small fines and turned loose for further violations. Enforcement was notoriously bad.

The forepart of the editorial of November 2nd deplored judicial action or interpretation that found every technicality of the law to protect the defendant and to nullify prosecution. It stated that this set people to wondering whether their courts were being subverted into refuges for law breakers. That this general condition so commented upon in the editorial was bad, even alarming, was more than established by the Grand Jury report, issued three days after the citation herein and before the trial. The Grand Jury report showed, statistically, the appalling number of criminals that were escaping punishment and the pitiably few that were being punished. It revealed a vast gambling ring financed and managed by gangsters with little interference by the police officers and a startling ineffectiveness in the courts to punish those brought before them. The Grand Jurors criticised pointedly the conditions to which these editorials and cartoon were directed.

The editorials illustrated this general ineffectiveness of the courts. The cartoon obviously applied to no particular case. The story of the Brook Club case was truly a sordid one; and that of the Teepee Club no better.

The action by the Supreme Court of Florida in upholding petitioners' convictions under the circumstances in this case was arbitrary and capricious and should be set aside by this Court. There was no clear and present danger of high imminence to the administration of justice in anything petitioners did or said.

POINT 3

The Supreme Court of Florida erred in holding that the cases discussed by petitioners were pending at the time of the publications.

For many years there was a great divergence of opinion as to what constitutes a pending case. Prior to the decision of this Court in *Bridges* v. *California*, *supra*, convictions of contempt were upheld or set aside in many in-

stances by a particular court before which they came for review on that court's concept of what constitutes a pending case. In *Bridges* v. *California*, however, this Court held that a publication is not to be denied the constitutional protection of freedom of the press merely because it concerns a judicial proceeding still pending in the courts.

As this Court said in *Bridges* v. *California*:

"• • • the argument runs, the power of judges to punish by contempt out-of-court publications tending to obstruct the orderly and fair administration of justice in a pending case was deeply rooted in English common law at the time the Constitution was adopted. That this historical contention is dubious has been persuasively argued elsewhere. • • •. In any event it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'

"• • • the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society. • • •

"• • • The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect. • • •

And again:

"• • • it must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish

utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that the more acute labor controversies are, the more likely it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.

The minority opinion in *Bridges* v. *California* discussed when a matter (not necessarily the entire case) may be deemed pending or not pending, observing, at page 304 that "when a case is pending is not a technical lawyer's problem, but is to be determined by the substantial realities of the specific situation", and, at page 291, that to be contemptuous a publication "must refer to a matter under consideration and constitute in effect a threat to its impartial disposition."

As has hereinbefore been pointed out, Judge Barns refused a preliminary injunction in the first Brook Club case upon the promise of defendants to put an end to gambling upon their premises. True, they said in their answer, they had permitted gambling in the belief it met with the approval of the law enforcement authorities. Subsequently, when there was a renewal of gambling at the Brook Club and the new State Attorney filed suit for injunction, after the taking of testimony Judge Holt granted a preliminary injunction. Months later, Judge Wiseheart, who had been informed by the State Attorney that he could not be present on that day, upon motion of counsel for the defendants vacated the preliminary injunction and dismissed the bill of complaint in the absence of the State Attorney who was engaged before the Grand Jury.

The order of dismissal was final. The matter was no longer pending.

Yet when petitioners commented upon the manner in which the Brook Club had eased itself out of the situation, Judges Barns and Wiseheart hauled them into court on a citation for contempt, convicted them, and fined them, which judgment was upheld by the Supreme Court of Florida.

The application for a preliminary injunction in the Teepee Club case was denied by Judge Holt in summary fashion, and, as petitioners herein have alleged, on the ground that the use of affidavits was reprehensive, in violation of the Florida statutes which unequivocally authorize the issuance of preliminary injunctions upon affidavit evidence. But the denial was final.

The rape indictments had been quashed by Judge Barns.

Therefore, in the light of this record whether the cases were pending or not, petitioners, under the ruling of this Court in the *Bridges* case, were free to comment upon the order of Judge Wiseheart vacating the preliminary injunction issued by another judge against the Brook Club and dismissing the bill of complaint. They were free to comment upon the order of Judge Holt denying the application of the State Attorney for an injunction against the operators of the notorious Teepee Club. They were free to comment upon the order of Judge Barns quashing the indictments against the defendants in the rape cases.

But the record is indisputable that none of these cases was pending, even in the sense of a case "pending", justifying a conviction for contempt under the application of the now discarded reasonable tendency rule.

There are innumerable decisions discussing the question as to whether a particular case is pending or not:

In *Craig* v. *Hecht*, *supra*, the petitioner had criticized the United States District Judge for the appointment of a receiver. The receivership and the main suit were still pend-

ing. In contempt proceedings (although the case was decided on a procedural question) Chief Justice Taft and Justice Holmes expressed their opinions on the merits and held that the matter had been concluded and free comment thereon could not be the subject of contempt proceedings, notwithstanding the severity of the criticism. Justice Holmes stated, "I do not see how to misstate past matters of fact of the sort charged here could be said to obstruct the administration of justice" (263 U. S. at p. 281).

In *Nixon* v. *State*, *supra*, the newspaper published an article criticizing the appointment of a receiver three months prior to the publication. Although the receivership proceeding was still pending, the publication was held to concern a matter not then pending and as such, privileged.

The case of *State ex rel. Pulitzer Publishing Co.* v. *Coleman, supra*, applies to petitioners' comment on the rape indictments in the case at bar. In the *Pulitzer* case a criminal dubbed "Puttynose" had been released by *nolle prosequi* of the indictment which had the same effect as the quashal of indictment in the case at bar. The newspaper criticized this action and was cited for contempt. The Missouri court reversed the conviction of contempt of the newspaper on the ground that the matter criticized was not still pending although the *nolle prosequi* could have been revoked during the term and the case could have been reinstated on the docket.

> "To rule otherwise would be to narrow the limits of permissible criticism so greatly that the right to criticize would cease to have practical value." (152 S. W. (2d) at p. 649.)

Even in Florida, it is provided that "nothing said or written or published, in vacation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt". (Sec. 38.23, Fla. Stats. Annotated

1941.) Under this Statute, the Florida Supreme Court had held in *Ex Parte Earman, supra*, that criticism in Earman's newspaper of the circuit judge for admitting to bail an alleged criminal was not of a pending matter even though the trial upon appeal was still pending and had been set for a later date, holding that the order respecting bail had been concluded.

It is submitted that the above authorities are applicable here. The Brook Club case had been disposed of by final decree of dismissal. The application for preliminary injunction in the Teepee Club case had been disposed of by denial. The original indictments in the Rape Cases had been disposed of by an order quashing the indictments. The judge was not actually engaged in hearing nor in considering any of the matters and the particular matters had been ruled upon with finality.

Therefore, the Supreme Court of Florida erred in upholding the judgment of guilt on the theory that the cases were pending and petitioners' discussion thereof tended to obstruct the fair and impartial administration of justice in pending cases.

POINT 4

The holding of the Supreme Court of Florida that the convictions affirmed do not violate the constitutional guaranty of a free press is in conflict with the decisions of this Court in Near v. Minnesota, supra; Grosjean v. American Press Co., supra; DeJonge v. Oregon, supra; Herndon v. Lowry, supra; Lovell v. Griffin, supra; Cantwell v. Connecticut, supra; Bridges v. California, supra; Murdock v. Pennsylvania, supra; Thomas v. Collins, supra.

Each of the foregoing cases had to do in one way or another with restraint of free speech or free press.

This Court has held that subsequent punishment (but not contempt) for such abuses as may exist in respect of com-

ment upon the actions of public officials—including judges—is the appropriate remedy consistent with constitutional privilege.

This remedy was not invoked. Contrary to the provisions of the Fourteenth Amendment, and to the decisions of this Court, the complaining judges asserted the power to punish petitioners in a proceeding the very nature of which has been condemned by this Court. The procedure they invoked was repugnant to the guaranty of a free press contained both in the state and Federal constitutions. The convictions resulting should have been set aside by the Supreme Court of Florida in harmony with this Court's decisions. Its judgment affirming the convictions below is repugnant to the constitutional guaranties and should be set aside by this Court.

Moreover, after stating that the only question that could be raised in the proceeding went to the reasonableness, arbitrariness or the discriminatory character of the contempt, the Florida Supreme Court observed, somewhat critically of the petitioners, "this question appellants have by-passed and elected to stand on their immunity from punishment under the Fourteenth Amendment" (R. 166).

Why should these petitioners be criticized for standing upon constitutional rights? The record abundantly shows that law enforcement had fallen down miserably in Miami. The answer established that fact and the Grand Jury report more than supported it. The right, even the duty, of all vehicles of public information mandated the freest discussion and criticism. The petitioners did this, and no more. There was, in truth, no falsehood, no deception nor any misrepresentation. It has not yet been pointed out or shown wherein these newspaper editorials contained a single word that was untrue. The Florida courts were simply annoyed and irritated by well-deserved and vigorous comment.

The facts justified even stronger criticism. Certainly, every detail of the court's action could not be reported. As well might the newspaper be required, in order to escape summary punishment, to publish the entire transcript of the court's proceedings. The alleged omissions were not of material character.

The most recent case before this Court is that of *Thomas v. Collins, supra,* where a labor organizer, for speaking and soliciting membership at a meeting in Texas, had been, under the state statute, enjoined before the event, indicted criminally thereafter, and cited for contempt of the court order. This Court mentioned the delicacy of the intrusion by the Federal government on a State's power with respect to contempt proceedings, but held that the delicacy could not remove the duty of doing so, stating with respect to freedom of speech and of the press:

> "The right is a national right, federally guaranteed."

Concerning the necessity for a clear and present danger, the Court emphasized:

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. * * * Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

But as has hereinbefore been pointed out the vice in the decision of the Florida Supreme Court is that it simply refused to be bound by the *Bridges* case. In effect, the Florida Supreme Court says that the State laws and decision on contempt, not any Federal rule or decision, will be applied and cannot be questioned unless the State rule is

arbitrarily or unreasonably applied. Indeed, it states that:

> "• • • we find nothing in the Bridges case indicating a purpose to supersede State law and decisions on the question or *to require State courts to conform to Federal pattern.*" (R. 165) (Emphasis supplied).

The Florida Supreme Court implies that it feels that the Federal rule on contempt as announced in the *Bridges* case is an unwarranted construction of, and a recent interpolation in, the Bill of Rights:

> "The Fourteenth Amendment adopted in 1868 dealt with a subject matter entirely foreign to freedom of the press, but in Gitlow vs. New York, 268 U. S. 625, 45 Sup. Ct. 625, 69 L. Ed. 1138, decided in 1925, the court said that the Fourteenth Amendment extended the immunity in the First Amendment to the States. So it was not until 1925 that anyone dreamed that the Federal Constitution had anything to do with the punishment for contempt under state law" (R. 164).

Moreover, if the Florida Supreme Court is allowed to disregard the rule laid down in the *Bridges* case, then a different rule with respect to freedom of the press, as secured by the Federal Constitution, will obtain in each of the forty-eight States of the Union.

The *Bridges* and *Collins* decisions were designed forever to put an end to such an intolerable situation.

Conclusion

In the light of the record in this case it is impossible to escape the conclusion that the Florida courts have attempted to establish a rule in that State for the purpose of silencing the press through the assertion of unlimited power by judges to inflict summary punishment on the press without benefit of constitutional protection as directed by this Court.

Both the judgment of the complaining judges and that of the Supreme Court of Florida upholding their judgment finding petitioners guilty of contempt of court give evidence throughout of an attempt to surround judges with a protection against criticism or comment in a manner wholly disapproved by this Court as repugnant to the guaranties of the First Amendment.

We, therefore, respectfully urge upon this Honorable Court the reversal of the judgment of the Supreme Court of Florida in the case at bar.

Respectfully submitted,

ROBERT R. MILAM,
E. T. MCILVAINE,
Greenleaf Building,
Jacksonville 1, Florida;
EDWARD E. FLEMING,
Ingraham Building,
Miami 32, Florida;
ELISHA HANSON,
729 15th Street, N. W.,
Washington 5, D. C.,
Attorneys for Petitioners.

APPENDIX

Constitutional Provisions Involved

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 13 of the Declaration of Rights of the State of Florida provides that:

> "Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the press."

Statutory Provisions Involved

Section 2.01, Florida Stats. 1941, is as follows:

> "2.01. Common Law and certain statutes declared in force.—The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the

fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state."

Sections 38.22 and 38.23, Florida Stats. 1941, read as follows:

"38.22. Power to punish.—Every court may punish contempts against it, but the punishment imposed by a justice of the peace shall not exceed twenty dollars fine or twenty-four hours imprisonment."

"38.23. Contempts defined.—A refusal to obey any legal order, mandate or decree, made or given by any judge either in term time or in vacation relative to any of the business of said court, after due notice thereof, shall be considered a contempt, and punished accordingly. But nothing said or written, or published, in vacation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt."

Sections 64.11 and 64.12, Florida Stats. 1941, read as follows:

"64.11. Abatement of nuisance; parties, by whom maintained.—Whenever any nuisance as defined in Sec. 823.05 is kept, maintained or exists, the state's attorney, county solicitor, county prosecutor, or any citizen of the county through any attorney he may select, may maintain his action by a bill in chancery in the proper court in the name of the State of Florida upon the relation of such attorneys or citizen to enjoin said nuisance, the person, or persons conducting or maintaining the same and the owner or agent of the building or ground upon which said nuisance exists."

"64.12. Abatement of nuisances; temporary injunctions.—In such action the court, judge or court commissioner before whom the bill may be brought may upon proper proof being made allow a temporary writ

of injunction without bond. If it shall appear to the satisfaction of the court, judge or court commissioner *by evidence or by affidavit* that a temporary injunction shall issue, the court, judge or court commissioner may in his discretion pending the determination of the bill of a final hearing enjoin (1) the conducting or maintaining of a nuisance; (2) the operating and maintaining of the place or premises where the nuisance is conducted or maintained; (3) the owner or agent of the building or ground upon which the nuisance exists; (4) and the conduct, operation or maintenance of any business or activity operated or maintained in the building or on the premises in connection with or incident to the conducting or maintenance of the nuisance. Such injunction order shall definitely specify the activities enjoined and shall not preclude the operation of any lawful business not conducive to the maintenance of the nuisance complained of: At least three days notice in writing shall be given defendant or defendants of the time and place of application for said temporary injuction." (Emphasis supplied.)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

FILED
OCT 19 1945
CHARLES ELMORE CROPLEY

No. 473

JOHN D. PENNEKAMP AND THE MIAMI HERALD PUBLISHING COMPANY,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. TOM WATSON,
Attorney General of Florida, The Capitol, Tallahassee, Florida;
GEORGE M. POWELL,
Assistant Attorney General of Florida, The Capitol, Tallahassee, Florida;
JAMES M. CARSON,
Special Assistant Attorney General of Florida, Congress Building, Miami, Florida;
GILES J. PATTERSON,
Special Assistant Attorney General of Florida, Florida National Bank Building, Jacksonville, Florida;
F. M. HUDSON,
Special Assistant Attorney General of Florida, Seybold Building, Miami, Florida;
M. L. MERSHON,
Special Assistant Attorney General of Florida, First National Bank Building, Miami, Florida,
Attorneys and Counsel for the State of Florida, Respondent.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Before proceeding to the consideration of the legal argument, respondent's counsel desire to point out and deal with certain matters in the petition and brief for petitioners that are either inaccurate or do not do full justice to the parts of the record in the Court below.

They are as follows:

1. On page 2 of the petition the statement is made that "The editorials dealt with law enforcement gen-

erally and mentioned three cases that had been disposed of by the court."

a) The part of the foregoing statement containing the words "that had been disposed of by the court," is inaccurate in that one of the three cases referred to was in reality eight indictments for rape, all of which were defective in that they did not contain the name of the person raped. The motions to quash were granted, but the prosecutions were not ended, the defendants being remanded to the custody of the sheriff for re-indictment, which subsequently occurred, the defendants being held in custody in the meantime.

While we are on this subject it may be well to point out to the Court a statement in the brief for the petitioners here in which on page 16 it is asserted that "The record is indisputable that none of the cases discussed in the editorials was pending before the Court at the time the editorials were printed." Upon the basis of this last statement, it is contended that "The refusal of the Florida Supreme Court to recognize these facts and reverse the judgment on appeal was arbitrary and capricious." As to a similar contention in the lower court Justice Terrell (R. 161) in exact accord with the facts made the following finding:

"The first paragraph of the fourth section then proceeds to illustrate the charge made in the third section by charging that Judge Paul D. Barns at the behest of the defendant peremptorily sent eight indictments for rape back to the grand jury for re-presentation and re-indictment because they were not properly drawn. The facts were that when the first of the eight rape cases was called the court was confronted with a motion to quash the indictment; on consideration of the motion *the prosecuting attorney agreed with the court that the indictment was defective because of failure to name the person raped and that the other seven were infected with a similar defect.* The grand jury was in session and Judge Barns promptly referred all the indictments back to the grand jury by which they were reconsidered

and new indictments were returned within twenty-four hours."

RAPE CASES—pending

Indictments in the eight rape cases had been quashed on October 30, 1944 (R. 137) and on October 31, 1944, new indictments were returned, defendants arraigned and their cases set for trial (R. 139; 141; 142), and this the petitioners knew on November 2, the date of publishing the editorial. The note on page 9 of petition, par. 4 referring to matters not of record states that the Miami Herald on November 1 published that they had been reindicted and arraigned for trial.

BROOK CLUB AND TEEPEE CLUB CASES—pending

The Brook Club case was dismissed on October 31, 1944 (R. 126) and it was within the power of the Court to reinstate it.

The Teepee Club case was pending and awaiting final termination, the last order entered being one denying motion of State's Attorney to set aside order of October 12, 1944, denying temporary injunction (R. 98).

2. On page 20 of their brief petitioners' counsel makes the following statement: "The citation didn't even allege that the comments of petitioners created any clear and present danger of high imminence to the administration of justice."

This statement is so adroitly constructed as to put forward a complaint of the absence of a conclusion, and at the same time to ignore the accompanying facts, and their unmistakable import.

On page 7 of the petitioners' brief they repeat the foregoing statement in the following form:

> "No allegation is to be found anywhere in the citation that either of the editorials or the cartoon created a clear and present danger of high imminence to the fair and impartial administration of justice in pending cases before either of the judges signing the citation."

On page 8 they record the fact that in their answer to the citation they "denied that the editorials and cartoon created a clear and present danger to the orderly administration of justice in the court."

This attempt to confine the consideration of the citation to the allegation of tendency, and to ignore the factual basis of the judges' action which are not denied, should not be indulged for the reason that it is essential to ascertain from the facts just what sort of a tendency it was, and what should be implied from the facts creating it.

Webster defines "tendency" as "A presumptive course of future change in continuation of observed phenomena." Let us see what the observed phenomena before us entitled us to presume.

In addition to the allegation of "tendency" we find the editorial of November 2, 1944 (R. 153) and the accompanying cartoon (R. 8A), and the editorial of November 7, 1944 (R. 157) which taken together constitute an attack so untruthful and defamatory as to compel the presumption that a clear and present danger of high imminence to the fair and impartial administration of justice, not only followed but immediately ensued.

To ignore these basic facts is no more logical than a contention that a person charged with murder did not commit the crime, he did but press his finger to the trigger of the pistol.

To follow this contention of the failure to place in the citation such words would exact of pleadings an exactness in respect to legal conclusions which is not required.

3. Before passing to the argument there is one further statement we wish to make, and that is that the part of the editorial containing what might be called the gravamen of the offence (R. 2) reads as follows:

> "Every accused person has a right to his day in court. But when judicial instance and interpretative procedure recognize and accept, even go out to

find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify prosecution, then the people's rights are jeopardized and the basic reason for courts stultified.

"'[fol. 5] The seeming ease and pat facility with which the criminally charged have been given technical safeguard have set people to wondering whether their courts are being subverted into refuges for lawbreakers.'"

This matter when read in connection with Sec. 776.03, Florida Statutes, 1941, which reads as follows:

"*Accessory after fact:*—Whoever, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to the offender, maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that he has committed a felony or been accessory thereto before the fact, with intent that he shall avoid or escape detection, arrest, trial, or punishment, shall be deemed an accessory after the fact, and be punished by imprisonment in the state prison not exceeding seven years, or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars.'"

charges the judges with being accessories after the fact to all of the crimes that the record shows were charged in the indictments before the court.

Lower Court's Holdings—Generally

Petitioners contending that the editorials and cartoon as applied to the facts did not constitute contempt submitted that:

"The publications upon which citation was based constituted legitimate criticism and comment within the

guaranties of Section 13 of the Declaration of Rights of the Constitution of Florida" (Petition p. 7).

to which the Supreme Court of Florida replied:

> "The law in Florida permits the most liberal exercise possible of freedom of the press but holds to account those who abuse it" (R. 171).
>
> *Penneckamp* v. *State*, 22 So. 2nd (text) 886.

that:

> "The publications upon which said citation was based constituted legitimate criticism and comment within the guaranties of the First and the Fourteenth Amendments to the Constitution of the United States" (Pet. p. 7).

to which contention the Supreme Court of Florida replied in effect:

> "'Freedom of the press' does not protect newspaper publisher if he chooses to lie about the court in his newspaper articles, and court is not helpless to do anything unless publisher lies in court room or his lying is manifested with such a high degree of imminence as to express a high degree of threat. F. S. A. Const. Declaration of Rights, sec. 11, 13; U. S. C. A. Const. Amends. 1, 6, 14:"
>
> *Penckamp* v. *State*, h. #21, 22 So. 2nd (text) 877.

that:

> "The publications complained of created no clear and present danger to the administration of justice" (Pet. p. 8).

to which contention the Supreme Court of Florida replied in effect:

> "Even if rule of 'clear and present danger' enunciated by United States Supreme Court in determining right to abridge freedom of the press is rule in state courts,

such courts are authorized to apply the rule by their own law and standards, and unless the application is shown to be arbitrary the state court's judgment should not be disturbed. F. S. A. Const. Declaration of Rights, sec. 11, 13; U. S. C. A. Const. Amends. 1, 6, 14."

Pennekamp v. *State*, hn. #23, 22 So. (text) 877.

"Editorials and a cartoon based on inaccurate, distorted, incomplete and biased reports of pending litigation, which imputed partisanship to circuit judges in favor of persons charged with crime which partisanship was stated to be so pronounced that judges refused to heed voice of the people's representatives, authorized conviction of publishers for contempt of court, and such judgment was free from error where it was not charged that it was obtained or applied in an arbitrary or unreasonable manner. F. S. A. Const. Declaration of Rights, sec. 11, 13; F. S. A. sec. 38.22, 28.23, 932.03; U. S. C. A. Const. Amends. 1, 6, 14." Hn. #24 (ibid).

Statement of Matters Involved

The editorial (R. 6) dealt with the action of the trial Court concerning what has been referred to in the citation (R. 1) and throughout the proceedings as the (A) Rape cases (R. 2; 134), the (B) Brook Club case #84054 (R. 3; 135), and the (C) Teepee Club case #87365 (R. 5; 136). Concerning these proceedings the Florida Supreme Court stated:

"The record was available in all these cases and it does not reveal a breath of suspicion on which to predicate partisanship and unfairness on the part of the judges. It is shown rather that they acted in good faith and handled each case to the very best advantage possible. There was no judgment that could have been entered in any of them except the one that was entered. If the editorials had stated the facts correctly, nothing but a correct conclusion could have been deduced and

there would have been no basis for contempt but here they elected to publish as truth a mixture of factual misstatement and omission and impose on that false insinuation, distortion, and deception and then contend that freedom of the press immunizes them from punishment" (R. 162).

Pennekamp v. *State*, 22 So. 2d (text) 882.

Applying the editorial to the above mentioned cases, the Supreme Court of Florida stated:

"The cartoon and the editorials assimilated, the deduction is inescapable that the circuit judges of Dade County are grabbing at technicalities to free criminals, that the voice of the people is thrown to the discard, that trials are juggled at the behest of the criminal, that the courts are in league with the underworld and will sanction any species of sham plea to give it the breaks. We can think of no better build-up on which the cerebral plummet could fathom a state of partisanship and unfairness more libelous to the court. Appellants contend that no such interpretation was intended but the answer to this contention is that a 'man reveals his mind by the symbols he adopts' and we find no reason to conclude that appellants did not adopt their symbols deliberately" (R. 163).

Pennekamp v. *State*, 22 So. 2d (Text) 883.

The citation dealt with these several cases identified and classified (A) Rape Cases, (B) Brook Club Case and (C) Teepee Club Case in the order in which they were dealt with by the editorial. So has the Supreme Court of Florida. Petitioners have confused the order of arrangement and dealt with them as follows: (B) Brook Club Case (R. 3), (C) Teepee Club Case (R. 4) and (A) Rape Cases (R. 5).

ARGUMENT

The six questions presented to the Supreme Court of Florida have dwindled to three, which are as follows:

> "The decision of the Supreme Court of Florida in this cause is in conflict with the decision of this Court in Bridges v. California, supra, and with state court and federal court decisions adhering to the test laid down in the Bridges case."
>
> "The action by the Supreme Court of Florida was arbitrary and capricious and should be reviewed by this Court."
>
> "The holding of the Supreme Court of Florida that the convictions affirmed do not violate the constitutional guaranty of a free press is in conflict with the decisions of this Court in Near v. Minnesota, supra; Grosjean v. American Press Co., supra; DeJonge v. Oregon, supra; Herndon v. Lowry, supra; Lovell v. Griffin, supra; Cantwell v. Connecticut, supra; Bridges v. California, supra; Murdock v. Pennsylvania, supra."

These three points and the authorities cited by counsel for petitioners in support of them are dealt with so thoroughly and convincingly by Mr. Justice Terrell who wrote the opinion of the Supreme Court of Florida (R. 153-171), which of necessity will be read and studied by the Justices of the United States Supreme Court to whom this case is referred for preliminary investigation, that the counsel for respondent, in the interest of brevity and expedition, and to lighten the burden of study and consideration by this Honorable Court, desire to submit this opinion by reference to the record and as a part of this brief.

Point 1

The Decision of the Supreme Court of Florida in This Case Is in Conflict With the Decision of This Court in Bridges v. California, Supra, and With State Court and Federal Court Decisions Adhering to the Test Laid Down in the Bridges Case.

The Supreme Court of Florida recognized the *Bridges* case and stated:

> "We have examined the editorials and the telegram involved in the Bridges case and we find nothing in them assaulting the integrity of the court. They would not have been contemptuous under the rule in the Hayes case" (R. 166).
>
> *Pennekamp* v. *State*, 22 So. 2d (text) 884,

that:

> "Certainly the courts are *interests* which the state may lawfully protect" (italics supplied) (R. 167) (ibid),

and

> "A newspaper may criticize, harrass, irritate, or vent its spleen against a person who holds the office of judge in the same manner that it does a member of the Legislature and other elective officers, but it may not publish scurrilous or libelous criticisms of a presiding judge as such or his judgments for the purpose of discrediting the Court in the eyes of the public" (R. 167) (ibid),

that:

> "It may also be confidently asserted that a free press is no freer than a free man, the one being as securely bound by approved canons of decency and propriety as the other. Neither is free to do as it will in total disregard of the right of others" (R. 168).
>
> *Pennekamp* v. *State*, 22 So. 2d (text) 885,

that:

> "We do not think that the rule in the Bridges case is applicable but if for any reason it may be held to be, the judgment is still free from error because it is not charged that it was applied in an arbitrary or unreasonable manner and if it were, there is no showing to that effect" (R. 171).
>
> *Ponnekamp* v. *State*, 22 So. 2d (text) 886.

POINT 2

The Action by the Supreme Court of Florida Was Arbitrary and Capricious and Should Be Reviewed by This Court

The citation charges that the editorial and cartoon libels the court by stating:

> "that the Judges of this Court therein acting (and this Court acting through them) have not fairly and impartially heard and decided the matters in said editorial mentioned and have thereby represented unto the general public that notwithstanding the great public trust vested in the Judges of this Court that they have not discharged their duties honorably and fairly in respect to said pending cases * * *" (R. 5).

When the contempt case came on for trial it was stated from the bench:

> "Judge Barns: * * * The respondents here have been brought to answer a charge that they made an unfair statement concerning the proceedings in court, and in turn have based criticism upon an unfair, untrue statement. It was considered not a full report, nor a fair report." (R. 57).

In ruling on the petitioners' motion to quash the trial court noted:

> "That the respondents have been cited on a charge of making an unfair and untrue report of court proceedings and in turn of making false imputations

against the court and its judges as such based upon respondents' own unfair and untrue report" (R. 128).

In applying the law to these facts the Florida Supreme Court held that:

> "It necessarily follows that the only question that can properly be raised here goes to the reasonableness, arbitrariness, or the discriminatory character of the contempt judgment or the Florida law under which it was imposed. This question appellants have by-passed and have elected to stand on their immunity from punishment under the Fourteenth Amendment" (R. 166).
>
> *Pennekamp* v. *State*, 22 So. 2d (Text) 884,

and decided that:

> "We therefore hold that the cartoon and the editorial afford ample support for the judgment imposed and that the issues were properly adjudicated under Florida law" (R. 171).
>
> *Pennekamp* v. *State*, 22 So. 2d (text) 886.

Point 3

(Doctrine of Subsequent Punishment)

Petitioners' third ground for "Reasons Relied on for the Allowance of the Writ," like their third point in Argument, advances that abuse of the freedom of the press is not subject to *previous* restraint but that:

> "Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege," quoting
>
> *Near* v. *Minnesota*, 283 U. S. (text) 719.

At the trial the same argument was advanced by counsel for petitioner (R. 61; footnote R. 144).

Doubtless the trial judges traveled from the beginning on the assumption that this was the law. The trial court's ruling contained the following language:

> "Freedom of the press is the liberty to print and publish without any previous leave of governmental authority, subject always to the consequences of the law" (R. 133).

Petitioners' petition states:

> "This Court has held that subsequent punishment for such abuses as may exist in respect of comment upon the actions of public officials—including judges—is the appropriate remedy consistent with constitutional privilege.
>
> "This remedy was not invoked" (Pet. p. 22).

There was no prior restraint. Prior punishment was not imposed. Punishment has been imposed and it was subsequent. This principle has been advanced by petitioner to the trial court and it was adhered to by the trial court. Counsel still insist that it is sound but has not been invoked. It is sound law.

There was no prior restraint and the punishment was subsequent and by the exercise of an appropriate remedy for the protection of the State's institution in the discharge of its functions and duty.

Conclusion

It is respectfully contended on behalf of respondent that the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. Tom Watson,
Attorney General of Florida,
The Capitol, Tallahassee, Florida;
George M. Powell,
Assistant Attorney General of Florida,
The Capitol, Tallahassee, Florida;
James M. Carson,
Special Assistant Attorney General
of Florida, Congress Building,
Miami, Florida;
Giles J. Patterson,
Special Assistant Attorney General
of Florida, Florida National Bank
Building, Jacksonville, Florida;
F. M. Hudson,
Special Assistant Attorney General
of Florida, Seybold Building,
Miami, Florida;
M. L. Mershon,
Special Assistant Attorney General
of Florida, First National Bank
Building, Miami, Florida,
Attorneys and Counsel for the
State of Florida, Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 473

JOHN D. PENNEKAMP and THE MIAMI HERALD PUBLISHING COMPANY;

PETITIONERS,

vs.

THE STATE OF FLORIDA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

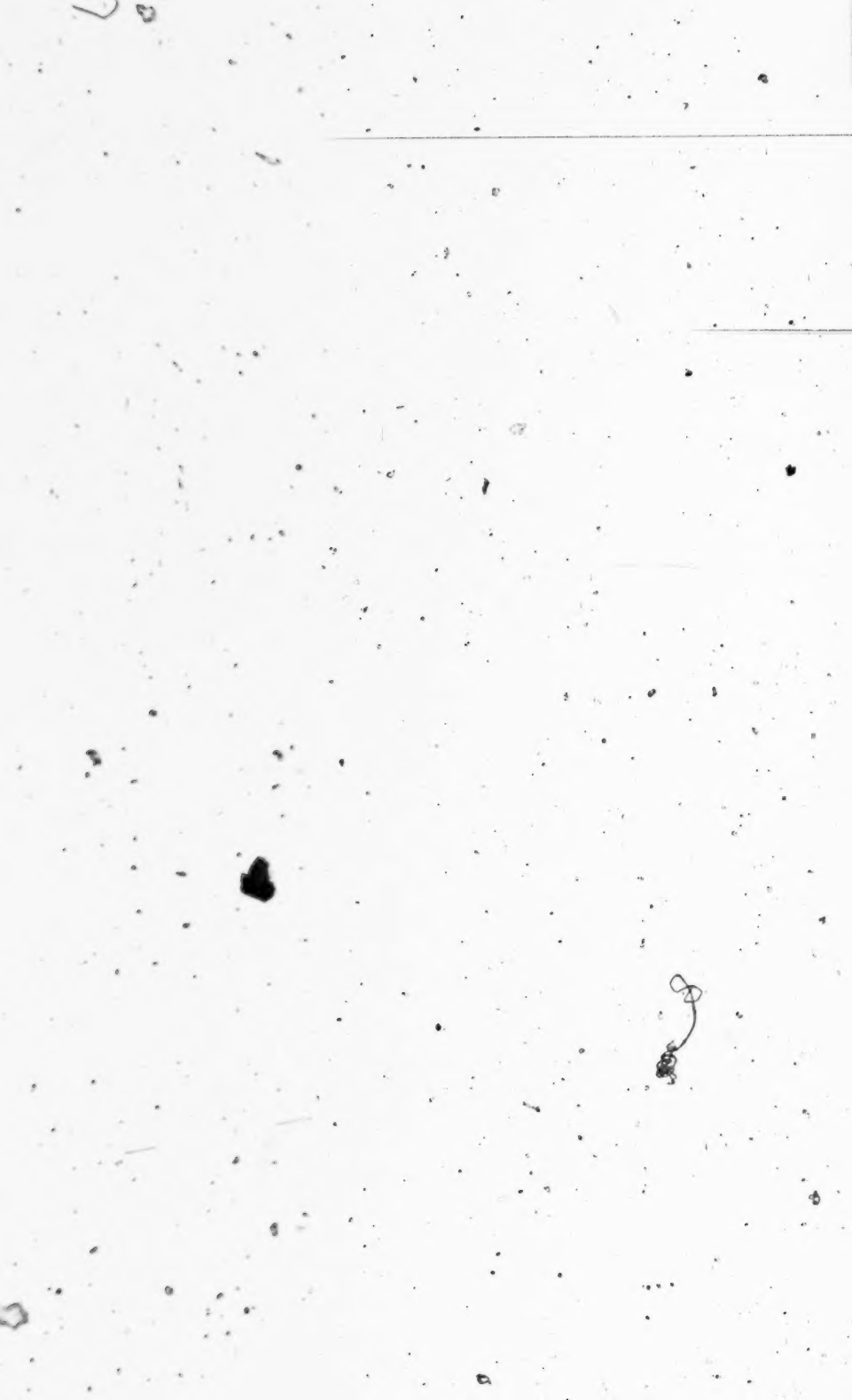
BRIEF FOR RESPONDENT

J. TOM WATSON
Attorney General of Florida

SUMTER LEITNER, *Assistant Attorney General of Florida*

JAMES M. CARSON, *Special Assistant Attorney General of Florida*

COUNSEL FOR THE STATE OF FLORIDA, RESPONDENT



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CORRECTIONS

The attorneys for the petitioners have, on page 2 of their brief, (although not required by Rule 27 of the United States Supreme Court to do so) attempted to state their opinion of the question presented.

It seems to us an unfair statement of the question.

We think there are two questions:

(1) May a state provide its own method of punishment for contempts of its own courts where such contempts present "a clear and present danger to an institution which the state is entitled to protect", to-wit: the courts of that state?

(2) Turning to the particular utterances (and cartoon) here in question and the circumstances of their publica-

tion, to what extent was the substantive evil of unfair administration of justice a likely consequence, and was the degree of likelihood sufficient to justify summary punishment?

STATEMENT OF CASE

Only a few mistakes have been discovered in the statement of the case as contained in the brief for the petitioners, most of them perhaps unintentional, but at least one must have been intentional.

It should be noted that before the publication of the editorial and the cartoon complained of, all of the defendants in the rape cases had been reindicted and rearraigned, and that the petitioners then knew that fact (R. 135).

Only one Brook Club case was referred to in the editorial, but now petitioners' counsel undertake to argue two.

In the Tepee Club case petitioners' counsel failed to state that the suit was for a permanent injunction, and that the denial of a temporary injunction in no way precluded the state from offering evidence, or ended the pending case.

With regard to the rape cases, the allegations of the answer to the effect that the State Attorney had said that he believed the indictments to be in proper form is contradicted by sub-section 3 of footnote on page 19 of the brief of petitioners.

The one misstatement of fact which must have been intentional is a reference to the minutes of the Court made for the day the motion to quash was granted. These were nothing but pencil notes, because minutes do not

become the minutes of a trial court until they are formally and finally written up and signed.

The misstatements of facts regarding the second Brook Club case speaks of testimony taken on an application for temporary injunction as if it had been taken after the case "came at issue." All of that part of the brief beginning with the second paragraph on page 10 refers to another Brook Club case, which is afterwards discussed as the second one. But even so, it appears that no testimony in that case was taken after the case came at issue.

The grand jury report is inaccurately stated with regard to felony cases. This part of the report referred only to gambling cases which charged felonies.

On page 21 of the brief it is stated that Mr. Justice Sebring concurred in Mr. Justice Buford's opinion. An examination of the record will show that he only concurred in Mr. Justice Buford's conclusion.

The brief fails to include in its statement of the case the fact that the Circuit Court in and for Dade County did not have jurisdiction of criminal prosecutions in gambling cases, but that such jurisdiction is lodged in the Criminal Court of Record in and for Dade County.

There were five indictments charging eight defendants with rape. All of the indictments were fatally defective, probably on account of the typographical error in writing them up. On October 30th, 1944 one of them was quashed, then, by agreement with the State Attorney, the other indictments with the same defects were quashed, and the next day new indictments supplying the missing words were found against the same defendants.

On November 2nd, 1944 an editorial attacking the

judges and charging them with all sorts of wrongdoing was published. The editorial did not mention the approval or agreement of the Assistant State Attorney to the entry of the orders. The citation recites that this officer agreed to the orders and the findings of fact say that he approved the orders. The affidavit of Henry Jones, recited in Petitioners' brief although not properly therein, says that the Assistant State Attorney did not concede the indictments in the rape cases to be defective, but because the grand jury was still in session and to obviate any question, he would have new indictments returned (Br. 19). Whether that is agreeing or approving, or merely consenting, makes no difference. They were the same defendants in the new indictments as in the old, and the cases against these eight defendants were still pending.

The petitioners attempt to criticize the court for ignoring a small news item printed in The Herald on November 1st to the effect that the new indictments had been filed. All that news item proves is that The Herald knew the whole situation before the editorial of November 2nd was published.

The petitioners herein, in answer to the citation, admitted that the State Attorney's office "merely made the suggestion that new indictments might well be obtained to remove doubt and question."

With regard to the Brook Club case, the answer of the respondents petitioners herein, to the citation and their brief in this court are not in agreement. In the brief, it is said that the State Attorney notified the court that at the time the motion for dismissal was set he would be engaged before a grand jury and requested an extension of time. (Br. 7). In the answer it is said that he notified the

"secretary" to the judge and counsel for the Brook Club of his inability to attend, and requested that the case be deferred. (Tr. 12).

In the statement of facts in the brief for petitioners in this court, they have overlooked the fact that in the decision in this case by the Supreme Court of Florida it was held that all of the decisions in the rape cases were correct, as well as Judge Wiseheart's decision in the Brook Club case and Judge Holt's decision in the Tepee Club case. In fact, it was said by Judge Terrell who wrote this opinion that no other judgment could have been entered in any of the cases except the one which was entered.

In the brief of petitioners, it is said that the publications "annoyed" the judges, but it is not said that both the Circuit Court and the Supreme Court directly held that the statements of fact in the editorial were false or distorted and that, pyramiding deception upon deception, The Herald had drawn unreasonable, unwarranted and false conclusions. A reading of Judge Terrell's opinion will also show that he did not ignore or attempt to set aside the effect of the Bridges case,[1] but the Supreme Court of Florida did hold that under the facts and circumstances in this case there was clear and present danger, and further held that the facts in the Bridges case would have required the acquittal of the respondents in Florida under our law.

SPECIFICATIONS OF ERRORS

On page 22 of the brief for petitioners, five so-called specifications of errors are set out. Number five is the only one which specifies an error. The others are argu-

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[1] Bridges vs. California, 314 U. S. 252.

mentative. Number two, particularly, shows a confusion of thought which the respondents have manifested throughout. The first half of the paragraph seems to say that in the citation there must be an "allegation" of clear and present danger, but the second half says that a conviction could be sustained only upon "proof" of a clear and present danger of high imminence.

ARGUMENT

There is a great deal of quibbling about the meaning of words in this case. The petitioners begin by referring to the matters which formed the basis of the proceeding, that is, the cartoon and the editorial, as something which "annoyed" the judges. The language of the editorial, and the cartoon, speak for themselves and are unambiguous. Of course, if there was nothing except annoyance to the individual judges involved, there would be nothing whatever to the case.

The question, however, is whether the matter complained of, and for the publication of which sentence was passed, presented such a threat that there was a clear and present danger of high imminence to an institution which the state of Florida is entitled to protect. The courts are such an institution. Under the "clear and present danger" doctrine this court has always made that question depend upon the facts and circumstances of each particular case without requiring in indictments, citations or other pleadings an "allegation" of clear and present danger.

The whole attempt on the part of petitioners is one to broaden the meaning of the phrase "freedom of the press," so that its legal effect shall be extended to cover absolute "immunity" of the press from punishment for anything on earth it chooses to publish. If there are to be no facilities for subsequent punishment for anything on earth the press chooses to publish, then we no longer have any law on libel or any law punishing contempts.

The Federal rule, of course, has been, since 1831, that contempts committed outside the presence of the court cannot be punished except upon indictment and trial by

jury, but that has never been the law in Florida and is not now the Florida law.

Section 13 of the Declaration of Rights of the State of Florida, quoted on page 42 of the brief for petitioners, makes the right of freedom of speech and the press subject to the provision that persons enjoying such rights shall be "responsible for the abuse of that right." The same provision, substantially, is found in the Constitution of almost every state in the Union. The Supreme Court of Florida, in its opinion in this case, uses this language:

> "The law in Florida permits the most liberal exercise possible of freedom of the press but holds to account those who abuse it." (22 So. (2d) 886.)

The petitioners, in their brief, claim that the Supreme Court of Florida has undertaken to nullify the decision in the Bridges case. We do not so read that opinion: They said:

> "We think the rule still persists that each case must stand or fall by the facts presented." (22 So. (2d) 884.)

Later, they said:

> "We have examined the editorials and the telegram involved in the Bridges case and we find nothing in them assaulting the integrity of the court. They would not have been contemptuous under the rule in the Hayes case." (22 So. (2d) 884.)

In discussing the Hayes case,[1] they said:

> "No question of pleading is involved and * * the 'clear and present danger cases' relied on by appel-

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[1] In Re Hayes, 72 Fla. 558, 73 So. 362, L.R.A. 1917 D 192; Ann. Cas. 1918 B. 936.

lants are not pertinent, the reason being that each case is determined in the light of its environment, the test being whether the words used will create the substantive evil that Congress and the Legislature have the power to prohibit."

There is no question that the Hayes case was and is the law of Florida, unless the rule in the Bridges case is to be so extended as to deny to the states the right to choose their own method of punishing publications which do present a clear and present danger to an institution the state is entitled to protect.

We do not believe that this court has any intention of so extending the rule in the Bridges case. Associated Press v. United States, 89 L. Ed. 1512, text 1515 and 1516.

As to the contention that disclaimer of intent to offend should immunize a newspaper from punishment, the rule is and has been that if the language is unambiguous and if the publication is admitted, then disclaimer of evil intent does not entitle the offenders to discharge.

The language of the editorial and the cartoon, taken together in this case, speak for themselves. The fact that petitioners now make the claim that they were attacking modes of procedure, rather than falsely impunging judicial acts, cannot permit them to deny the plain meaning of their language.

The only question for this Court to decide, is whether the Bridges case, decided upon a different set of facts, in a different state of statutory law, and under entirely different circumstances, should be so extended as to reverse the decision of the state court based upon its own statutes and decisions, where it is undoubtedly true that neither Bridges nor the Times Mirror would have been adjudged guilty on the basis of the facts in this case.

At the outset of the Bridges opinion, it is said:

"The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation."

Bridges v. State of California (supra) text 261.

We feel that the gist of the Bridges case is found in Section 3 of Judge Black's opinion, in these words:

"We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment."

In affirming the Circuit Court of Dade County, the Supreme Court of the State of Florida found:

"The cartoon and the editorials assimilated, the deduction is inescapable that the circuit judges of Dade County are grabbing at technicalities to free criminals, that the voice of the people is thrown to the discard, that trials are juggled at the behest of the criminal, that the courts are in league with the underworld and will sanction species of sham plea to give it the breaks." (22 So. (2d) 883.)

Earlier, the Court had said:

"If the editorials had stated the facts correctly, nothing but a correct conclusion could have been deducted and there would have been no basis for contempt but here they elected to publish as truth a mixture of factual misstatement and omission and impose on that false insinuation, distortion, and deception and then contend that freedom of the press immunizes them from punishment." (22 So. (2d) 882.)

The facts in the Bridges case are entirely different

from those in this case, and the statutory law of California is entirely different from that of Florida.

The Nye case,[1] which is attempted to be argued in the brief for petitioners, does not hold that contempt is not punishable, but it does hold that contempts outside the courtroom can be punished only by the method of procedure laid down by Federal statute.

In their brief petitioners attempt to argue that none of the cases for which the judges were criticized, was pending at the time of the publication of the editorial and the cartoon, although in their brief in this case before the Florida Supreme Court, page 47 thereof, they made the following statement:

"It was not only unfair but clearly illegal for the judges in their opinion to apply the cartoon to the rape cases. They had not been dismissed but there had simply been an order quashing the indictments which is not a dismissal of the crime charged." Surely, the Florida Court has a right to decide under the law of Florida whether a case is pending at a given time or not, and in this Pennekamp case it held that all of the cases were pending under the procedure in Florida, so that that portion of the argument contained in the brief for petitioners must fall. Certainly they have misread the meaning of the Earman case[2] in Florida. In that decision it was nowhere held that the matter was not a pending one.

In this case we should call the Court's attention to the fact that the whole question is whether the matters published were used in such circumstances and were of such

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[1] Nye vs. United States, 313 U. S. 33.

[2] Exparte Earman 85 Fla. 297 (95 Sou. 755.)

a nature as to create a clear and present danger, that they will bring about the substantive evils that the state has a right to prevent.

If the publication conformed to the rule laid down in the Bridges case, that is, that the substantive evil must be extremely serious and the degree of imminence extremely high before the utterances can be punished, then the procedure is entirely within the control of the state, and, as we have already pointed out, it is recognized by the Hayes case and other decisions extending back one hundred years.

Obviously, we do not contend that without there being shown clear and present danger of bringing about substantive evils the conviction should be affirmed.

On the other hand if there was such clear and present danger, and if it is a substantive evil to bring the courts into disrepute and disrespect by the use of false insinuation, distortion and deception which amounts to charges of unwarranted partisanship and unfairness on the part of the judges, then we submit the conviction should be affirmed.

In most instances when private rights are wrongfully invaded and tresspassed upon a presumption of damages —not mere danger—arises as a matter of law—Damages is more than danger.

When the public institution—its court—while actively engaged in the discharge of its functions of administering justice in a proper manner is falsely and unfairly maligned, is it not a fair inference and deduction that the institution has suffered a clear and present danger from such evil? And is not the temple of justice an institution which the State is entitled to protect?

When the judges of the institution is damaged by libel per se concerning judicial acts can it not be rightfully and naturally assumed that the court then and there suffers danger—and danger from evil acts?

The principle that the State's courts are to be protected from evil dangers is one of necessity developed to preserve and protect this sovereign institution in order that it may more fully serve its purpose.

In that connection, we quote what the Supreme Court of Florida said with regard to the vice in the editorials:

> "So the vice in both the editorials was the distorted, inaccurate statement of the facts and with that statement were scrambled false insinuations that amounted to unwarranted charges of partisanship and unfairness on the part of the judges." (22 So. (2d) 882.)

The fundamental question in this case is whether the procedure of the courts of Florida is subject to regulation by this Court. Mr. Giles J. Patterson has compiled an elaborate digest of the provisions of the Constitutions of the different states with regard to freedom of the press, as of 1908.

In that year only six states in the Union failed to have in the Bill of Rights or the Declaration of Rights, provisions that those enjoying either the right or the liberty of free speech and freedom of the press were responsible for the abuse of the right, or, as phrasd in many of the Constitutions, the abuse of that liberty. That compilation is being attached to this brief as an appendix.

Mr. Patterson has pointed out that of the original thirteen colonies, only Delaware had in its original Con-

stitution a provision that persons enjoying free speech or freedom of the press should be responsible for the abuse of the liberty, but he also points out that an equivalent phrase was contained in the Pennsylvania Constitution of 1792, and that practically all of the states now have such constitutional provisions.

Meaning of Phrases

In a footnote in the Bridges case Mr. Justice Black incorporates the words of James Madison on the subject of the meaning of words in England and in the United States, as follows:

> "To these observations one fact will be added, which demonstrates that the common law cannot be admitted as the universal expositor of American terms, * * . The freedom of conscience and of religion are found in the same instruments which assert the freedom of the press. It will never be admitted that the meaning of the former, in the common law of England, is to limit their meaning in the United States."

Bridges v. State of California (supra) Footnote 10.

The effect of that language is to say that in England the phrase "freedom of the press" had a different meaning from that which it has had in the United States since the Revolution. At the time John Milton was writing on the subject, "freedom of the press" meant the right to print whatever one pleased without previous submission to authority or censorship. Neither there nor here has it ever been held that the words "freedom of the press" should be expanded to mean "immunity of the press" from subsequent punishment.

The meaning of many words has changed from time to

time and from century to century. There is a whole supposedly new science, called "sematics," based upon the change in the meaning of words from time to time. We say supposedly new because there is actually nothing new about it. For hundreds of years our courts have been trying precisely and carefully to define the meaning of words or phrases. Witness the number of volumes of "Words and Phrases" printed within the past forty or fifty years.

The thing which this Court must decide now is whether the press can further expand the meaning of the words "freedom of the press" so that they can print whatever they please, can even "lie about the courts," can bring our whole system under constant attack without any fear whatever of punishment, no matter how false the facts reported, no matter how severe or unjustified their charges against courts may be, and escape scot free upon the ground that any attempt to punish them for anything they might choose to publish would be an infringement upon the right of the freedom of the press.

Mr. Justice Black pointed out in the Bridges case that the right to a fair and impartial trial is fully as fundamental a right as the right of free speech and free press.

We may here call attention to the fact that judges in Florida are elected and for comparatively short terms ranging from four to six years. The Miami Herald is a paper with a week day circulation of more than 125,000. Judges on our benches have only small audiences. They decide 7,000 cases or more a year (in the Circuit Court of Dade County alone,) and many thousands in other courts.

The very editorial here under discussion started out by pointing out to these judges that they had to face the elec-

torate, and then proceeded in the rest of the editorial to accuse them of every wrongdoing possible for a judge. The editorial and the cartoon speak for themselves, but we call attention to two paragraphs of the editorial showing the purpose of The Miami Herald to bring the courts into disrepute after reminding the judges that they had to run for office in a comparatively short time:

> "Every accused person has a right to his day in court. But when judicial instance and interpretative procedure recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify prosecution, then the people's rights are jeopardized and the basic reason for courts stultified.
>
> "The seeming ease and pat facility with which the criminally charged have been given technical safeguard have set people to wondering whether their courts are being subverted into refuges for lawbreakers." (Tr. 7.)

No matter how much fortitude a life member of the Federal judiciary may have against newspaper attacks, no matter how much he may be willing to ignore them, can it be said that elective judges cannot be intimidated by powerful newspapers? If they can be intimidated, and if the intention of the newspaper to intimidate them is as clear as it is in this case, must it not then follow that such conduct as the petitioners in this case have been guilty of presents a clear and present danger of high imminence to an institution which the state of Florida is entitled to protect?

Do not the constitutional provisions of forty-two of the states which provide that those enjoying freedom of the press shall be responsible for the abuse of that right or that liberty show that the people of the country have

long since recognized that every right carries with it a corresponding responsibility? Can the press claim the right to say whatever it pleases, no matter how false nor how contemptuous, and find a situation in the law where it cannot be punished?

It has been the history of every class or group of men who have lately come to power to undertake to extend and consolidate that power. It has for centuries been the task of the lawyers who speak the English language and of the judges who sit upon English-speaking benches to restrain the abuse of power.

Nobody undertakes to deny the power of press under modern conditions. There are many instances where those who can speak to hundreds of thousands of people a day have undertaken to control the economics, politics, and even the thoughts of the people of this country. If it is a mere matter of opinion on the part of the publisher, then of course he has every right to express it, but he has no right to publish false statements of facts or distorted conclusions based upon misstatements of fact, at least to the extent that he cannot be punished either civilly or criminally for his wrongdoing.

This Court has recently held that even so powerful an institution as the Associated Press[1] is amenable to the laws of the land. If the petitioners in this case are freed from the burden of their wrongdoing, then it is almost impossible to imagine how far they will go in the future, and it is also impossible to imagine how far other more unscrupulous men will go. To give the press an unlimited right to tear down our cherished institutions would undoubtedly mean that we were paving the road

[1] Associated Press vs. United States, 89 Law Ed. 1512.

on which some future American Hitler might ride to power.

Common Law in Florida

In the Supreme Court of the state of Florida[2] it was pointed out that the common law in the original thirteen colonies was theirs at the time of the American Revolution. It was also pointed out that the two Floridas (East and West Florida) were two British colonies east of the Mississippi which did not join in the Revolution but remained English throughout.

Thereafter, they were ceded back to Spain and remained Spanish until purchased by the United States under the Treaty of 1819, the "change of flags" occurring in 1821, so that, when Section 2.01 of the Florida Statutes 1941 was enacted in 1829 it represented a deliberate choice as between the common law of England and the Spanish law on the part of the people of the new territory.

The effect of this statute differs somewhat from the effect of the common law of the thirteen original colonies, because they had their own decisions as a basis. This statute in Florida sets a date (July 4, 1776) and incorporates into the laws of Florida the common and statute laws of England of a general nature in force on that date, provided they are not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of Florida.

Even before that statute was adopted the power of the

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[2] A. L. & D. Co. vs. McRae, 86 Fla. 393, 98 So. 505; Coleman vs. State, 118 Fla. 201, 159 So. 504.

Court to punish for contempt was limited by an act passed in 1828, which is now Section 38.23 of the Florida Statutes of 1941. That limitation has been allowed to stand and the decisions of the courts of Florida have always recognized it.

The restraint used by Florida courts in punishing contempt has been so satisfactory to the people that the power of the courts to punish for different sorts of contempt has been many times enlarged by statute. There has been no attempt to regulate the procedure on the part of the Legislature. All questions of procedure have been decided by the courts. So far from being arbitrary or capricious in the punishment of contempt have our courts always been, that the method of procedure has been allowed to stand unchanged for nearly one hundred and twenty years.

It should not be passed without notice that while this case was pending in the Supreme Court of Florida that the Legislature of Florida was in session, and said Legislature passed and adopted Chapter 23004, Laws of Florida, 1945, amending Section 38.22, Florida Statutes, 1941, extending and enlarging the power of the court in matters of contempts against it.[1]

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[1] Section 38.22, Florida Statutes, 1941, as amended by Chapter 23004, Laws of Florida, 1945:

"38.22 *Power to Punish.* Every Court may punish contempts against it, whether such contempts be direct, indirect, or constructive, and in any such proceeding the Court shall proceed to hear and determine all questions of law and fact, but the punishment imposed by a Justice of the Peace shall not exceed Twenty ($20.00) Dollars fine, or twenty-four (24) hours imprisonment."

No matter what the provisions of the Federal Statute as to procedure, nor the statutory provisions of other states regulating the procedure, that has nothing to do with the power of the people of Florida under their rights as citizens of a sovereign state to keep the method of procedure best adapted to their own needs and their own circumstances.[2]

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[2] Justice Black, who wrote the opinion in the case of Bridges v. California, in his dissenting opinion in the case of International Shoe Company v. Washington, 90 L. Ed. 119, also voiced the fears that the constitutional rights of the states were being unwarrantedly invaded by the Supreme Court of the United States, when he quoted with approval the opinion of Judge Holmes:

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable." Baldwin v. Missouri, 281 U. S. 586, 595, 74 L. Ed. 1056, 1061, 50 S. Ct. 436, 72 A. L. R. 1803.

CONCLUSION

We therefore respectfully urge:

First, that each state is entitled, under our Federal system, to choose its own method of protecting its own institutions.

Second, that the things done by the petitioners in this case were a false, deliberate, willful and planned attack upon the courts of the state and were such as to bring about a clear and present danger of high imminence to an institution the state is entitled to protect.

Third, that, judged by the facts and circumstances peculiar to this case, there is no conflict between the decision of the Supreme Court of Florida in this case and the decision of the Supreme Court of the United States in the Bridges case.

Fourth, that the petitioners are clearly guilty of contempt of court, and, having declined the offer of the citing judges to call in other judges to decide the case, they are not entitled to object to the summary procedure.

Fifth, they made no objection to the mode of procedure at any stage of the case, but, on the contrary, acquiesced in it.

Sixth, that not only were they guilty of contempt of court in the first instance, but their entire attitude since has been defiant and contemptuous, and there has been no attempt to apologize or to right the wrong intentionally done, and, on the contrary, they have said that the actions of the judges, all of which were approved by the Supreme Court of Florida, would have justified even stronger criticism.

Seventh, a reversal of this case would enlarge the meaning of the phrase "freedom of the press" so that it would hereafter mean "immunity of the press" from punishment for all of its willful, deliberate, false and intentional abuse of the courts or other of our time-tried institutions.

It is therefore respectfully submitted that the decision of the Supreme Court of Florida should be affirmed.

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J. TOM WATSON
Attorney General of Florida

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SUMTER LEITNER, *Assistant*
Attorney General of Florida

.....

JAMES M. CARSON, *Special Assistant*
Attorney General of Florida

COUNSEL FOR THE
STATE OF FLORIDA,
RESPONDENT

APPENDIX

CONSTITUTIONAL PROVISIONS OF STATES RELATING TO FREEDOM OF SPEECH AND OF THE PRESS.

ALABAMA

1819 Art. 1, Sec. 8

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

1865 Art. 1, Sec. 5 Same
1867 Art. 1, Sec. 6 Same
1875 Art. 1, Sec. 5 Same
1901 Art. 1, Sec. 4

"that no law shall ever be passed to curtail or restrain the liberty of speech or of the press and that a person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

ARKANSAS

1836 Art. 2, Sec. 7

"that printing presses shall be free to every person; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject—being responsible for the abuse of that liberty."

1864 Art. 2, Sec. 7 Same
1868 Art. 1, Sec. 2

"The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."

CALIFORNIA

1849 Art. 1, Sec. IX

"Every citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech and of the press."

1879 Same

COLORADO

1876 Art. 2, Sec. 10

"That no law shall be passed impairing the freedom of speech; that every person shall be free to speak, write and publish whatever he will on any subject, being responsible for the abuse of that liberty."

CONNECTICUT

1818 Art. 1, Sec. 5

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

Sec. 6

"No law shall ever be passed to curtail or restrain the liberty of speech and of the press."

DELAWARE

1792 Art. 1, Sec. 5

"The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject being responsible for the abuse of that liberty."

1831 Art. 1, Sec. 5 Same

1897 Art. 1, Sec. 5 Same

FLORIDA

1838 Art. 1, Sec. 5

"That every citizen may freely speak, write, and publish his sentiments, on all subjects, being respon-

sible for the abuse of that liberty; and no law shall ever be passed to curtail, abridge, or restrain the liberty of speech and of the press."

1865 Art. 1, Sec. 5 Same

1868 Art. 1, Sec. 10 Same

1885 Declaration of Rights, Sec. 13 Same

GEORGIA

1777 Art. LXI

"Freedom of the press and trial by jury to remain inviolate forever."

1789 No Bill of Rights

1798 Art. 4, Sec. 5

"Freedom of the press and trial by jury, as heretofore used in this state, shall remain inviolate."

1865 Art. 1, Sec. 6

"Freedom of speech and printing of the press, are inherent elements of political liberty. But while every citizen may freely speak or write or print on any subject he shall be responsible for the abuse of the liberty."

1868 Art. 1, Sec. 9 Same

1877 Paragraph XV

"No law shall ever be passed to curtail, or restrain, the liberty of speech, or of the press; any person may speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that liberty."

IDAHO

1889 Art. 1, Sec. 9

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

ILLINOIS

1818 Art. 8, Sec. 22

"The printing presses shall be free to every person who undertakes to examine the proceedings of the general assembly or of any branch of Government; and no law shall ever be made to restrain the right

thereof. The free communication of thoughts and opinions is one of the invaluable rights of man and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."

1870 Art. 2, Sec. 4

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

INDIANA

1816 Art. 1, Sec. 9 Identical with Illinois 1818

1851 Art. 1, Sec. 9

"No law shall be passed restraining the free interchange of thought and opinion, or restricting the right to speak, write or print, freely, on any subject whatever; but for the abuse of that right every person shall be responsible."

IOWA

1846 Art. 1, Sec. 7

"Every person may speak, write and publish his sentiments on all subjects being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

1857 Art. 1, Sec. 7 Same

KANSAS

1855 Art. 1, Sec. 11

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

1857 Art. 15, Bill of Rights, Sec. 7

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."

1858 Art. 1, Sec. 11

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

1859 Sec. 11

"The liberty of the press shall be inviolate; and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of that right."

KENTUCKY

1792 Art. 12, Sec. 7

"That the printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature or any branch of the Government and no law shall ever be made to restrain the right thereof. The free communications of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

1799 Art. 10, Sec. 7 Same

1850 Art. 13, Sec. 9 Same

1890 Bill of Rights, Sec. 8, Same

LOUISIANA

1812 Art. 6, Sec. 21

"That the printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature or any branch of the Government and no law shall ever be made to restrain the right thereof. The free communications of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

1845 Art. 110

"The press shall be free. Every citizen may freely

speak, write, and publish his sentiments on all subjects; being responsible for an abuse of this liberty."

1852 Art. 106 Same

1864 No Bill of Rights

1868 Title 1, Art. 4

"The press shall be free; every citizen may freely speak, write and publish his sentiments on all subjects being responsible for an abuse of this liberty."

1879 Art. 4

"No law shall be passed respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech, or of the press."

1898 Art. 3

"No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of this liberty."

MAINE

1819 Art. 1, Sec. 4

"Every citizen may freely speak, write and publish his sentiments on any subject, being responsible for the abuse of this liberty; no laws shall be passed regulating or restraining freedom of the press."

MARYLAND

1776 Sec. XXXVIII

"That the liberty of the press ought to be inviolably preserved."

1851 Declaration of Rights, Sec. 38 Same

1864 Art. 40

"That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write or publish, his sentiments on all subjects being responsible for the abuse of that liberty."

1867 Art. 40 Same

MASSACHUSETTS

1780 Part of first Art. XVI

"The liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth."

MICHIGAN

1835 Art. 1, Sec. 7

"Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no laws shall be passed to restrain or abridge the liberty of speech or of the press."

1850 Art. 4, Sec. 42

"No laws shall be passed to restrain or abridge the liberty of speech or of the press. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."

MINNESOTA

1857 Art. 1 Sec. 3

"The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."

MISSISSIPPI

1817 Art. 1, Sec. 6

"Every citizen may freely speak, write or publish his sentiments on all subjects, being responsible for the abuse of that liberty."

Sec. 7. "No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

1832 Same as Art. 1, Secs. 6 and 7

1868 Art. 1, Sec. 4

"The freedom of speech and of the press shall be sacred."

1890 Art. 3, Sec. 13

"The freedom of speech and of the press shall be sacred."

MISSOURI

1829 Art. 13, Sec. 16

"that the free communication of thoughts and opinions is one of the invaluable rights of man, and that every person may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

1865 Art. 1, Sec. 27 Same

1875 Art. 2, Sec. 14

"that no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty."

MONTANA

1889 Art. 2, Sec. 10

"No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for the abuse of that liberty."

NEBRASKA

1866 Art. 1, Sec. 3

"Every person may freely speak, write or publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press."

1875 Art. 1, Sec. 5

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

NEVADA

1864 Art. 1, Sec. 9

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech and of the press."

NEW HAMPSHIRE

1784 Art. 1, Sec. XXII

"The liberty of the press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved."

1792 Part First Art. XXII Same

1902 Part First Sec. 22 Same

NEW JERSEY

1776 No reference

1844 Art. 1, Sec. 5

"Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

NEW YORK

1777 No reference

1821 Art. 7, Sec. 8

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

1846 Art. 1, Sec. 8 Same

1894 Art. 1, Sec. 8 Same

NORTH CAROLINA

1776 Declaration of Rights, Sec. XV

"that the freedom of the press is one of the greatest bulwarks of liberty and, therefore, ought never to be restrained."

1868 Art. 1, Sec. 20

Same as 1776 except it adds "but every individual should be held responsible for the abuse of the same."

1876 Art. 1, Sec. 20 Same as 1868

NORTH DAKOTA

1889 Art. 1, Sec. 9

"Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege."

OHIO

1802 Art. 8, Sec. 6

"that the printing presses shall be open and free to every citizen who wishes to examine the proceedings of any branch of Government, or the conduct of any public officer; and no law shall ever restrain the right thereof. Every citizen has an indisputable right to speak, write or print, upon any subject as he considers proper, being liable for the abuse of that liberty."

1851 Art. 1, Sec. 11

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

OREGON

1857 Art. 1, Sec. 8

"No law shall be passed restraining the free expression of opinion or restricting the right to speak, write, or print freely on any subject whatever, but every person shall be responsible for the abuse of this right."

PENNSYLVANIA

1776 Declaration of Rights, Sec. XII

"that the people have a right to freedom of speech and of writing, publishing their sentiments; therefore, the freedom of the press ought not to be restrained."

1776 Plan of Government, Sec. 35

"The printing presses shall be free to every person who undertakes to examine proceedings of the Legislature or any part of the government."

1790 Art. 9, Sec. 7

"That the printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature or any branch of the Government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

1838 Art. 9, Sec. 7 Same

1873 Art. 1, Sec. 7 Same

RHODE ISLAND

1842 Art. 1, Sec. 20

"The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments on any subject, being responsible for the abuse of that liberty."

SOUTH CAROLINA

1776 No Bill of Rights

1778 Sec. XLIII

"that the liberty of the press be inviolably preserved."

1790 No reference

1865 No reference

1868 Art. 1, Sec. 7

"All persons may freely speak, write and publish their sentiments on any subject, being responsible for the abuse of that right; and no laws shall be enacted to restrain or abridge the liberty of speech or of the press."

1895 Art. 1, Sec. 4

"The General Assembly shall make no law respecting the establishment of religion or prohibiting its free exercise thereof, or abridging the freedom of speech or of the press."

SOUTH DAKOTA

1889 Art. 6, Sec. 5

"Every person may freely speak, write or publish on all subjects, being responsible for the abuse of that right."

TENNESSEE

1796 Art. 11, Sec. 19

"that the printing presses shall be free to every person, who undertakes to examine the proceedings of the Legislature or of any branch or officer of the Government; and no law shall ever be made to restrain the rights thereof. Free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

1834 Art. 1, Sec. 19 Same

1870 Art. 1, Sec. 19 Same

TEXAS

1845 Art. 1, Sec. 5

"Every citizen shall have the liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."

1866 Art. 1, Sec. 5 Same

1868 Art. 1, Sec. 5 Same

1876 Art. 1, Sec. 8 Same

UTAH

1895 Art. 1, Sec. 15

"No law shall be passed to abridge or restrain the freedom of speech or of the press."

VERMONT

Chapter 1, Sec. XIV

"that the people have a right to freedom of speech and of writing and publishing their sentiments;

therefore, the freedom of the press ought not to be restrained."

1786 Chapter 1, Sec. XV

"that the people have a right of freedom of speech and of writing and publishing their sentiments concerning the transactions of the Government—and, therefore, the freedom of the press ought not to be restrained."

1793 Chapter 1, Art. 13 Same

VIRGINIA

1776 Bill of Rights, Sec. 12

"that the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments."

1830 Art. 1 Reaffirms Declaration of Rights of 1776

1850 Bill of Rights Sec. XII Same

1864 Art. 1, Sec. 14

Same as earlier Constitutions except there is added: "and any citizen may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

1902 Art. 1, Sec. 12—Same as 1864

WASHINGTON

1889 Art. 1, Sec. 5

"Every person may freely speak, write or publish on all subjects, being responsible for the abuse of that right."

WEST VIRGINIA

1861 Art. 2, Sec. 4

"No law abridging freedom of speech or of the press shall be passed; but the Legislature may provide for the restraint and punishment of the publishing, vending and printing of obscene books, papers, and pictures and of libel and defamation of character, and for the recovery in civil actions, by the aggrieved party for suitable damages for such libel or defamation. Attempts to justify or to uphold an

armed invasion of the State or an organized insurrection therein, during the continuance of such invasion or insurrection by publicly speaking, writing or printing, or by publishing of circulars, such writing or printing, may be, by law, declared a misdemeanor and punished accordingly."

1872 Art. 3, Sec. 7—Same as 1861, but omitting sentence beginning "attempts to justify armed invasion * *"

WISCONSIN

1848 Art. 1, Sec. 3

"Every person may freely speak, write or publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press."

WYOMING

1889 Art. 1, Sec. 20

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1945

No. 473

JOHN D. PENNEKAMP and THE MIAMI HERALD PUBLISHING COMPANY,

Petitioners,

vs.

THE STATE OF FLORIDA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT THEREOF

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

[illegible] M. COE,
WILLIAM HARRISON MIZELL,
of the Florida Bar,

OSMOND K. FRAENKEL,
of the New York Bar,

Of Counsel.

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THE STATE OF FLORIDA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Motion for Leave to File Brief as *Amicus Curiae*

May it please the Court.

The undersigned as counsel for the American Civil Liberties Union, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae*. The consent of the attorney for the petitioners to the filing of this brief has been obtained. Counsel for respondent has refused to grant his consent.

Special reasons in support of this motion are set out in the accompanying brief.

January 14, 1946.

OSMOND K. FRAENKEL,
Counsel for American Civil Liberties Union, Amicus Curiae.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 473

JOHN D. PENNEKAMP and THE MIAMI HERALD PUBLISHING COMPANY,

Petitioners,

vs.

THE STATE OF FLORIDA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Interest of the American Civil Liberties Union

The American Civil Liberties Union is interested in this case because, like the case of *Bridges* v. *California*, 314 U. S. 252, decided several years ago by this Court, there are here presented far reaching questions affecting freedom of the press. It is our view that the decision of the Supreme Court of Florida in the instant case departs from the principles laid down by this Court in the *Bridges* case.

Statement of the Case

The contempt charge in the case at bar rested on two editorials and a cartoon. The editorials criticized

the manner in which certain of the judges in the Dade County Circuit Court had handled criminal proceedings. At the time that the editorials were written and published, these proceedings had been completely terminated. The cartoon was published in connection with one of the editorials and was illustrative of one of the criticisms in that editorial, namely that a judge had dismissed an injunction against a club charged with gambling.

The state courts upheld the contempt charge on the ground that certain of the statements made in the editorials were untrue and misleading. The majority of the Florida Supreme Court held that the "clear and present danger" rule had no application to the case whatever. The decision of this Court in the *Bridges* case was distinguished on the ground that it should be confined to its own facts. The Florida Court stressed this Court's reference in that case to the circumstance that California had no law punishing out of court publications, whereas Florida did have such a law (R. 165).

In this connection, it may be pointed out that the Florida statute to which the majority of the court referred (R. 158, Florida Statutes 1941, Section 3823) does not constitute a direct authority for the punishment of out of court publications. Such authority merely is derived from the fact that the statute prohibits punishment of any statement or publication if made "in vacation". This is a far cry from the kind of specific statute to which this Court referred to in the *Bridges* case. In any case we submit that the question of constitutional right is not to be determined by the form of the state statute.

The majority of the Florida Court, further distinguished the *Bridges* case on the ground (R. 166) that there was nothing in the publications there involved which attacked the integrity of the court. We do not believe

that that is the criterion which should govern punishment for contempt.

In effect, the majority of the Florida Supreme Court made the determining fact the truth or falsity of the criticisms contained in the editorials. It is submitted that this confuses the law of contempt of court with the law of libel.

On the other hand, the minority of the Florida Supreme Court could find nothing in the editorials which challenged the integrity of the courts, stressed the fact that none of the cases about which the judge's action was criticized were pending at the time the editorials were published and concluded that this Court's decision in the *Bridges* case was controlling (R. 171, 172).

ARGUMENT

The contempts of court here appealed being imposed for criticisms of terminated judicial proceedings violate the freedom of the press guaranteed by the First and Fourteenth Amendments.

1. We believe that it may be helpful in aiding this Court to reach a decision in the case at bar to analyze the basis on which punishment for contempt of court can properly rest. We submit that that basis is entirely different from the basis on which the law of libel is founded. Libelous statements are actionable in the civil courts for the protection of individuals; they may be prosecuted in the criminal courts because they tend to disturb the peace. Ordinarily libelous statements do not involve any questions of general public policy. It is for that reason that a claim of constitutional right is seldom asserted in defense of a libel prosecution—and no case involving that

question has been decided by this Court. The accident of an evenly divided Court prevented any expression of opinion on one phase of this question in *Schenectady Union Publishing Co.* v. *Sweeney*, 316 U. S. 642.

On the other hand, prosecutions for contempt of court almost always involve questions of general policy. They usually arise out of public criticism of some phase of the action of one or more judges. Questions of interference with freedom of speech and of the press are necessarily involved in such cases. Nevertheless convictions for contempt of court may be proper because of the great interest which society has in maintaining a judiciary free from improper influence. Therefore, where a publication, although appearing to be couched in general terms as a criticism of the courts, is of such a character and is issued at such a time that its real purpose is to influence a judge in the handling of a particular case, then such a publication can properly be punished as a contempt of court. We respectfully suggest that no publication can ever be punished as a contempt of court unless such be its purpose and timing.

We recognize of course, that this Court is not primarily concerned with the form which a particular state prosecution takes. There can be no doubt that if a state has constitutional power to restrict a particular kind of utterance that power is not lost because the state cast its punishment in the form of contempt of court rather than in the form of libel. The fact that the state has cast its punishment in the form of contempt of court indicates, however, that the state has conceived of the offending expression not as directed against an individual's good name but as challenging some policy pursued by the judiciary. Moreover to prosecute for contempt what is actually only a libel would be "sheer denial

of due process" because permitting conviction for an offense not charged. *De Jonge* v. *Oregon*, 299 U. S. 353.

We submit that a publication containing an expression of opinion concerning judicial conduct cannot be punished, by way of contempt except when the publication actually obstructs or was intended improperly to obstruct the administration of justice, or perhaps, regardless of intent, under unusual circumstances where it is clear from the circumstances that there was a danger that substantial obstruction of justice would result from the publication. Guided by these principles the courts should be able to preserve their independence without interfering with the right of the citizen to criticize. The judge would be protected from direct solicitation for a particular decision in a particular case; he would not be protected from criticis of the decision. The courts and the public would also be protected in situations of peculiar delicacy from publications not directly intended to produce improper judicial action but which in those peculiar circumstances would have such result. Thus criticism of judicial action would normally be possible free from threat of punishment.

Any other rule would leave the citizen at the mercy of changing standards of judicial sensitiveness. And when the history of prosecutions for contempt for publication is reviewed, as was done by Nelles and King, Contempt by Publication in the United States, 28 Col. L. R. 401, 525 and 533, and by Thomas, Problems of Contempt of Court (1934), it should be plain that much proper criticism of the courts has been punished as contemptuous.

2. Applying these principles to the case at bar, we find that there was clearly no attempt to influence the decision of any pending case, because the cases referred to

in the editorials had all been completed long before the editorials were published. The purpose of the editorials was to call attention to what the writers believed to be unsatisfactory conditions controlling the conduct of criminal cases. That in some particulars, the statements in the editorials might not have truthfully discussed the legal problems involved in the case, or might even have given a false impression of the precise decision surely make no difference. The test should be the general purpose to be inferred from the writing complained of, not the precise conformity of the writing to the whole truth. Any other test would make it too difficult for a layman ever to criticize judges.

In the *Bridges* case, both the majority and minority recognized that a charge of contempt of Court could be sustained only if the publication complained of sought to influence a judge in the decision of a pending case. Both the majority and minority agreed that two of the editorials published by the Los Angeles Times could not justify any charge of contempt. Mr. Justice Frankfurter said at page 298:

> "As the special guardian of the Bill of Rights, this Court is under the heaviest responsibility to safeguard the liberties guaranteed from any encroachment, however astutely disguised. The Due Process Clause of the Fourteenth Amendment protects the right to comment on a judicial proceeding, so long as this is not done in a manner interfering with the impartial disposition of a litigation."

The difference between the majority and minority in the *Bridges* case consisted solely of their appraisal of the effect on the judges involved of the remaining Los Angeles Times editorial and the Bridges' telegram.

Both of these related to cases still pending. The problem, therefore, which divided this Court then is not present in the case at bar.

On the contrary, observations of both the majority and minority make it plain that no publication can be punished as a contempt of court merely because it affects the judiciary generally.

Mr. Justice Black pointed out that the contempt charges against Bridges and the Los Angeles Times were sought to be sustained on two ground:

> "Disrespect for the judiciary; and disorderly and unfair administration of justice."

Commenting on the first of these two grounds he said at page 270:

> "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."

Mr. Justice Frankfurter at page 287 pointed out that any attempt to punish for contempt persons responsible for "scandalizing the court" was improper, saying, "Such foolishness has long since been disavowed in England and has never found lodgement here." The case at bar is evidentally an attempt to punish what Mr. Justice Frankfurter there thought was improper. He further said at 291:

"A publication intended to teach the judge a lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power. Compare Judge Learned Hand in *Ex parte Craig*, 282 F. 138, 160-61. It must refer to a matter under consideration and constitute in effect a threat to its impartial disposition. It must be calculated to create an atmospheric pressure incompatible with rational, impartial adjudication. But to interfere with justice it need not succeed. As with other offenses, the state should be able to proscribe attempts that fail because of the danger that attempts may succeed. The purpose, it will do no harm to repeat, is not to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed. The purpose is to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal. The power should be invoked only where the adjudicatory process may be hampered or hindered in its calm, detached, and fearless discharge of its duty on the basis of what has been submitted in court. The belief that decisions are so reached is the source of the confidence on which law ultimately rests."

3. Judged therefore by the criteria laid down by both the majority and minority in the *Bridges* case, the charges of contempt of court made in the case at bar go far beyond the constitutional power of the state. They interfere with freedom of the press and should be condemned by this Court.

Accordingly the judgment appealed from should be reversed.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
As Amicus Curiae.

JOHN M. COE,
WILLIAM HARRISON MIZELL,
of the Florida Bar,

OSMOND K. FRAENKEL,
of the New York Bar,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 473.—October Term, 1945

John D. Pennekamp and the Miami Herald Publishing Company Petitioners,
vs.
The State of Florida.

On Writ of Certiorari to the Supreme Court of the State of Florida.

[June 3, 1946.]

Mr. Justice Reed delivered the opinion of the Court.

This proceeding brings here for review a judgment of the Supreme Court of Florida. — Fla. —, 22 So. 2d 875, which affirmed a judgment of guilt in contempt of the Circuit Court of Dade County, Florida, on a citation of petitioners by that Circuit Court.

The individual petitioner was the associate editor of the Miami Herald, a newspaper of general circulation, published in Dade County, Florida, and within the jurisdiction of the trial court. The corporate petitioner was the publisher of the Miami Herald. Together petitioners were responsible for the publication of two editorials charged by the citation to be contemptuous of the Circuit Court and its judges in that they were unlawfully critical of the administration of criminal justice in certain cases then pending before the Court.

Certiorari was granted to review petitioners' contention that the editorials did not present "a clear and present danger of high imminence to the administration of justice by the court" or judges who were criticized and therefore the judgment of contempt was invalid as violative of the petitioners' right of free expression in the press. The importance of the issue in the administration of justice at this time in view of this Court's decision in *Bridges v. California*, 314 U. S. 252, three years prior to this judgment in contempt, is apparent.

Bridges v. California fixed reasonably well marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation. The case placed orderly operation of courts as the primary and dominant require-

ment in the administration of justice. Pages 263, 265, 266. This essential right of the courts to be free of intimidation and coercion was held to be consonant with a recognition that freedom of the press must be allowed in the broadest scope compatible with the supremacy of order. A theoretical determinant of the limit for open discussion was adopted from experience with other adjustments of the conflict between freedom of expression and maintenance of order. This was the clear and present danger rule. The evil consequence of comment must be "extremely serious and the degree of imminence extremely high before utterances can be punished." Page 263. It was, of course, recognized that this formula, as would any other, inevitably had the vice of uncertainty, page 261, but it was expected that from a decent self-restraint on the part of the press and from the formula's repeated application by the courts standards of permissible comment would emerge which would guarantee the courts against interference and allow fair play to the good influences of open discussion. As a step toward the marking of the line, we held that the publications there involved were within the permissible limits of free discussion.

In the *Bridges* case the clear and present danger rule was applied to the stated issue of whether the expressions there under consideration prevented "fair judicial trials free from coercion or intimidation." Page 259. There was, of course, no question as to the power to punish for disturbances and disorder in the court room. Page 266. The danger to be guarded against is the "substantive evil" sought to be prevented. Pages 261, 262, 263. In the *Bridges* case that "substantive evil" was primarily the "disorderly and unfair administration of justice." Pages 270, 271, 278.[1]

The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process

[1] Compare Schenck v. United States, 249 U. S. 47, 52; Thornhill v. Alabama, 310 U. S. 88, 105; Carlson v. California, 310 U. S. 106, 113; Board of Education v. Barnette, 319 U. S. 624, 633.

Clause of the Fourteenth Amendment protect.[2] When the highest court of a state has reached a determination upon such an issue, we give most respectful attention to its reasoning and conclusion but its authority is not final. Were it otherwise the constitutional limits of free expression in the Nation would vary with state lines.[3]

While there was a division of the Court in the *Bridges* case as to whether some of the public expressions by editorial comment transgressed the boundaries of a free press and as to the phrasing of the test, there was unanimous recognition that California's power to punish for contempt was limited by this Court's interpretation of the extent of protection afforded by the First Amendment. *Bridges* v. *California*, *supra*, at 297. Whether the threat to the impartial and orderly administration of justice must be a clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness, depends upon a choice of words. Under any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes.

The editorials of November 2d and 7th, 1944, which caused the court to issue the citation are set out below.[4] Accompanying the

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[2] Gitlow v. New York, 268 U. S. 652, 666; Near v. Minnesota, 283 U. S. 697, 707.

[3] Bridges v. California, 314 U. S. 252, 267. Compare Chambers v. Florida, 309 U. S. 227, 228; Hooven & Allison Co. v. Evatt, 324 U. S. 652, 659.

[4] November 2, 1944:

"*Courts Are Established*—

For the People.

"The courts belong to the people. The people have established them to promote justice, insure obedience to the law and to Punish Those Who Willfully Violate It.

"The people maintain the courts by providing the salaries of officials and setting up costly chambers and courtrooms for the orderly and dignified procedure of the tribunals.

"Upon the judges the people must depend for the decisions and the judicial conduct that will insure society—as a whole and in its individuals—against those who would undermine or destroy the peace, the morality and the orderly living of the community.

"In Order that the courts should not be amenable to political or other pressures in their determination of matters placed before them, Florida Circuit judges are called upon to face the electorate less often than are other elective office holders.

"So long are their terms, in fact, that in Dade county no Circuit judge, and only one judge of another court, has come to the bench by public choice

first editorial was a cartoon which held up the law to public obloquy. It caricatured a court by a robed compliant figure as a judge on the bench tossing aside formal charges to hand a document, marked "Defendant dismissed," to a powerful figure close at his left arm and of an intentionally drawn criminal type. At the right of the bench, a futile individual, labeled "Public Interest" vainly protests.

The citation charges that the editorials

> "did reflect upon and impugn the integrity of said Court and the Judges thereof in imputing that the Judges of said Court 'do recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to

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in the first instance. All the others have been named by a governor to fill a vacancy caused by death or resignation, or similar circumstance.

"Judicial terms in Dade county run:

1—Six years each for six Circuit judges.
2—Four years each for two Civil Court of Record judges.
3—Four years for the judge of the Criminal Court of Record.
4—Four years for the judge of the Court of Crimes.
5—Four years for County judge.
6—Four years for Juvenile court judge.

"These twelve judges represent the majesty and the sanctity of the law. They are the first line of defense locally of organized society, against vice, corruption and crime, and the sinister machinations of the underworld.

"It Is beyond question that American courts are of, by and for the people.

"Every accused person has a right to his day in court. But when judicial instance and interpretative procedure recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify prosecution, then the people's rights are jeopardized and the basic reason for courts stultified.

"The seeming ease and pat facility with which the criminally charged have been given technical safeguard have set people to wondering whether their courts are being subverted into refuges for lawbreakers.

"This Week the people, through their grand jury, brought into court eight indictments for rape. Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn. Back they went to the grand jury for re-presentation to the court.

"Only in the gravest emergency does a judge take over a case from another court of equal jurisdiction. A padlock action against the Brook Club, was initiated lastospring before Judge George E. Holt, who granted a temporary injunction.

"After five months, the case appeared Tuesday out of blue sky before Judge Marshall C. Wiseheart at the time State Attorney Stanley Milledge was engaged with the grand jury.

"Speedy decision was asked by defense counsel despite months of stalling. The State Attorney had to choose between the grand jury and Judge Wiseheart's court.

"The judge dismissed the injunction against the club and its operators. The defense got delay when it wanted and prompt decision from the court when it profited it.

"On Oct. 10 Judge Holt had before him a suit by the state to abate a nuisance (bookmaking) at the Tepee Club.

block, thwart, hinder, embarrass and nullify prosecution,' which said acts by you tend to create a distrust for said court and the judges thereof in the minds of the people of this county and state and tend to prevent and prejudice a fair and impartial action of the said Court and the Judges thereof in respect to the said pending case[s]."

After setting out details of alleged willful withholding and suppression of the whole truth in the publications, the citation further charges that

"you, by said cartoon and editorial, have caused to be represented unto the public that concerning the cases of (A) the eight indictments for rape, (B) the said Brook Club case, and

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"Five affidavits of persons who allegedly visited the premises for the purpose of placing bets were introduced by the state over the objection of the defendants.

"Judge Holt ruled them out, explaining in denying the injunction against the Tepee Club:

"'The defendant cannot cross-examine an affidavit. The court cannot determine who is testifying and whether belief can be placed upon such testimony . . . The fact that such affidavits were taken before the State Attorney does not give them any additional weight or value.'

"This may be good law, exact judicial evaluation of the statutes. It is, however, the character of legal interpretation which causes people to raise questioning eyebrows and shake confused heads in futile wonderment.

"If Technicalities are to be the order and the way for the criminally charged either to avoid justice altogether or so to delay prosecution as to cripple it, then it behooves our courts and the legal profession to cut away the deadwood and the entanglements.

"Make it possible for the state's case, the people's case, to be seen with equal clarity of judicial vision as that accorded accused lawbreakers. Otherwise technicalities and the courts make the law, no matter what the will of the people and of their legislators."

November 7, 1944:

"*Why People Wonder.*

"Here is an example of why people wonder about the law's delays and obstructing technicalities operating to the disadvantage of the state—which is the people—in prosecutions.

"After stalling along for months, the defense in the padlock case against the Brook Club appeared before Judge Marshall C. Wisheart for a decision. The State Attorney was working with the grand jury. The court knocked out the injunction. There was speed, dispatch, immediate attention and action for those charged with violation of the law. So fast that the people didn't get in a peep.

"That's one way of gumming up prosecution. Another is to delay action. On March 29, Coy L. Jaggears, bus driver, was sentenced to fifteen days in city jail by Judge Cecil C. Curry on conviction of beating up a taxicab operator.

"The arrest precipitated the notorious bus strike. As a result, Jaggears walked out of jail after posting a $200 appeal bond. The appeal never got further.

"There you have the legal paradox, working two ways, but to the same purpose against prosecution. Speed when needed. Month after month of delay when that serves the better."

(C) the Teepee Club case, that the Judges of this Court [had not] fairly and impartially heard and decided the matters in said editorial mentioned and have thereby represented unto the general public that notwithstanding the great public trust vested in the Judges of this Court that they have not discharged their duties honorably and fairly in respect to said pending cases as hereinbefore set forth, all of which tends to obstruct and interfere with the said Judges as such in fairly and impartially administering justice and in the discharging of their duties in conformity with the true principles which you have so properly recognized in the forepart of said editorial above quoted as being incumbent upon them and each of them; . . ."

Petitioners were required to show cause why they should not be held in contempt.

Petitioners answered that the publications were legitimate criticism and comment within the federal guaranties of free press and created no clear and present danger to the administration of justice. They sought to justify the publications by stating in their return to the rule that the facts stated in the editorials were correct, that two of the cases used as examples were not pending when the comments were made, since orders of dismissal had been previously entered by the Circuit Court, and that they as editors

> "had the right if not the duty openly and forcefully to discuss these conditions to the end that these evils that are profoundly disturbing to the citizens of this county, might be remedied. The publications complained of did nothing more than discuss the generally recognized weakness and breakdown in the system of law enforcement and call for its improvement."

It is not practicable to comment at length on each of the challenged items. To make our decision as clear as possible, we shall refer in detail only to the comments concerning the "Rape Cases." These we think fairly illustrate the issues and are the most difficult comments for the petitioners to defend.

As to these cases, the editorial said:

> "This Week the people, through their grand jury, brought into court eight indictments for rape. Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn. Back they went to the grand jury for re-presentation to the court."

We shall assume that the statement, "judicial instance and interpretative procedure . . . even go out to find, every possible technicality of the law to protect the defendant . . . and nullify prosecution," refers to the quashing of the rape indictments as well as other condemned steps. The comment of the last two paragraphs evidently includes these dismissals as so-called legal technicalities. See Note 4.

The citation charged that the prosecuting officer in open court agreed that the indictments were so defective as to make reindictment advisable. Reindictments were returned the next day and before the editorial. It was charged that these omissions were a wanton withholding of the full truth.

As to this charge, the petitioners made this return:

> "That as averred in the citation, a motion was made to quash the indictment in Case 856, the ruling upon which would control in the other cases mentioned. Whereupon the representative of the State Attorney's Office stated in effect that he believed the original indictment was in proper form, but to eliminate any question he would have these defendants immediately re-indicted by the Grand Jury which was still then in session. And thereupon, the Judge of said Court did sustain the motion to quash with respect to Case No. 856.

The record of the Criminal Division of the Circuit Court, set out in the findings of fact at the hearing on the citation in contempt, shows that in case No. 856 the court upheld the defendants' motion to quash "with the approval of the Assistant State Attorney" and quashed the remaining indictments on his recommendation. Reindictment of the accused on the next day, prompt arraignment and setting for trial also appears. We accept the record as conclusive of the facts.

We read the Circuit Court's judgment to find that the comment on the Rape Cases contained only "half-truths," that it did not "fairly report the proceedings" of the court, that it contained "misinformation." The judgment said:

> "To report on court proceedings is a voluntary undertaking but when undertaken the publisher who fails to fairly report does so at his own peril.
>
> "We find the facts recited and the charges made in the citation to be true and well founded; . . ."

This finding included the fact that reindictments were then pending in the Rape Cases. Defendant's assignments of error chal-

lenged the ruling that the matters referred to in the editorials were pending and the Supreme Court of Florida ruled that the cases were pending. 22 So. 2d at 883:

> "We also agree that publications about a case that is closed no matter how scandalous, are not punishable as contempt. This is the general rule but the Florida Statute is more liberal than the rule."

Cf. Florida Statutes 1941, § 38.23 and § 932.03; see also 22 So. 2d at 886.

In *Bridges* v. *California*, 314 U. S. 252, 271-78, dissent 297-302, this Court looked upon cases as pending following completed interlocutory actions of the courts but awaiting other steps. In one instance it was sentence after verdict. In another, a motion for a new trial.

Pennekamp was fined $250 and the corporation $1,000.00.

The Supreme Court of Florida restated the facts as to the Rape Cases from the record. 22 So. 2d at 881. It then reached a conclusion as to all of the charges and so as to the Rape Cases in the words set out below.[5] After further discussion of the facts, the Court said, *id.*, at 883:

> "In the light of this factual recitation, it is utter folly to suggest that the object of these publications was other than to abase and destroy the efficiency of the court."

To focus attention on the critical issue, we quote below from the decision of the Supreme Court of Florida certain excerpts which we believe fairly illustrate its position as to the applicable law.[6]

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[5] 22 So. 2d 875, 882: "So the vice in both the editorials was the distorted, inaccurate statement of the facts and with that statement were scrambled false insinuations that amounted to unwarranted charges of partisanship and unfairness on the part of the judges.

"The record was available in all these cases and it does not reveal a breath of suspicion on which to predicate partisanship and unfairness on the part of the judges. It is shown rather that they acted in good faith and handled each case to the very best advantage possible. There was no judgment that could have been entered in any of them except the one that was entered. If the editorials had stated the facts correctly, nothing but a correct conclusion could have been deduced and there would have been no basis for contempt but here they elected to publish as truth a mixture of factual misstatement and omission and impose on that false insinuation, distortion, and deception and then contend that freedom of the press immunizes them from punishment."

[6] 22 So. 2d 875, 884, 885, 886:

"A newspaper may criticize, harass, irritate, or vent its spleen against a person who holds the office of judge in the same manner that it does a member of the Legislature and other elective officers, but it may not publish scurrilous or libelous criticisms of a presiding judge as such or his judg

From the editorials, the explanations of the petitioners and the records of the court, it is clear that the full truth in regard to the quashing of the indictments was not published. We agree with the Supreme Court that the Rape Cases were pending at the time of the editorials. We agree that the editorials did not state objectively the attitude of the judges. We accept the statement of the Supreme Court that under Florida law, "There was no judgment that could have been entered in any of them except the one that was entered." 22 So. 2d at 882. And, although we may feel

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ments for the purpose of discrediting the Court in the eyes of the public. Respect for courts is not inspired by shielding them from criticism. This is a responsibility of the judge, acquired over the years by the spirit in which he approaches the judicial process, his ability to humanize the law and square it with reason, the level of his thinking, the consistency of his adherence to right and justice, and the degree to which he holds himself aloof from blocs, groups, and techniques that would sacrifice justice for expediency."

"Courts cannot function in a free country when the atmosphere is charged with the effusions of a press designed to poison the mind of the public against the presiding judges rather than to clarify the issues and propagate the truth about them. The latter was the press that Mr. Jefferson visioned when he promulgated the thesis, 'Our liberty depends on the freedom of the press and that cannot be limited without being lost.'"

"Freedom to publish one's views is a principle of universal practice, but when the press deliberately abandons the proprieties and sets out to poison its pabulum or to sow dragon's teeth and dispense canards for the purpose of doing another a wrong, it is no different category from a free man that does likewise. The most rigid safeguard thrown around a free press would not protect appellants from falsely publishing or announcing to the world that the clergy of Miami were in sympathy with the practice of polygamy or were fostering other doctrines equally obnoxious to approved moral standards."

"The theory of our system of fair trial is that the determination of every case should be induced solely by evidence and argument in open court and the law applicable thereto and not by any outside influence, whether of private talk or public print."

"The State Courts touch the public more frequently than the Federal Courts and they have many reasons to enforce orderly administration that would not arise in the Federal Courts. If that power is to be construed by what appellants contend to be the pattern in the Bridges and Nye cases, then more than one hundred years of state law and decisions on the subject are turned into confusion or set at naught. . . .

"We do not think this can be the law. The Bridges case was disposed of on authority of the 'clear and present danger' cases,' which are not analogous to most of the state cases because they arise from a different state of the law. The ultimate test in the Bridges case requires that the 'substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.' Even if this test is to [be] the rule in the State Courts, 'they are authorized to apply it by their own law and standards and unless the application is shown to be arbitrary and unreasonable, their judgment should not be disturbed. The law in Florida permits the most liberal exercise possible of freedom of the press but holds to account those who abuse it.

"We therefore hold that the cartoon and the editorials afford ample support for the judgment imposed and that the issues were properly adjudicated under Florida law."

that this record scarcely justifies the harsh inference that the truth was willfully or wantonly or recklessly withheld from the public or that the motive behind the publication was to abase and destroy the efficiency of the courts, we may accept in this case that conclusion of the Florida courts upon intent and motive as a determination of fact.[7] While the ultimate power is here to ransack the record for facts in constitutional controversies, we are accustomed to adopt the result of the state courts' examination.[8] It is the findings of the state courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights.[9]

The acceptance of the conclusion of a state as to the facts of a situation leaves open to this Court the determination of federal constitutional rights in the setting of those facts.[10] When the *Bridges* case was here, there was necessarily involved a determination by the California state court that all of the editorials had, at least, a tendency to interfere with the fair administration of criminal justice in pending cases in a court of that state. Yet this Court was unanimous in saying that two of those editorials had no such impact upon a court as to justify a conviction of contempt in the face of the principles of the First Amendment. We must, therefore, weigh the right of free speech which is claimed by the petitioners against the danger of the coercion and intimidation of courts in the factual situation presented by this record.

Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve.[11] Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct.[12] It does not follow that public com-

[7] See IX Wigmore, Evidence (3d Ed.) § 2557. Crawford v. United States, 212 U. S. 183, 203.

[8] Drivers Union v. Meadowmoor Co., 312 U. S. 287, 293-94; Lisenba v. California, 314 U. S. 219, 238.

[9] Chambers v. Florida, 309 U. S. 227, 239; Ashcraft v. Tennessee, 322 U. S. 143, 152, 153, 154; Malinski v. New York, 324 U. S. 401, 404.

[10] See the cases in the preceding paragraph, note 8.

[11] Murdock v. Pennsylvania, 319 U. S. 105, 115; Board of Education v. Barnette, 319 U. S. 624, 639; Thomas v. Collins, 323 U. S. 516, 527, 530.

[12] Bridges v. California, 314 U. S. at 269:

"No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what

ment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation. Between the extremes there are areas of discussion which an understanding writer will appraise in the light of the effect on himself and on the public of creating a clear and present danger to the fair and orderly judicial administration. Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.

While a disclaimer of intention does not purge a contempt, we may at this point call attention to the sworn answer of petitioners that their purpose was not to influence the court. An excerpt appears below.[13] For circumstances to create a clear and present danger to judicial administration, a solidity of evidence should be required which it would be difficult to find in this record. Compare *Baumgartner* v. *United States*, 322 U. S. 665, 670; *Schneiderman* v. *United States*, 320 U. S. 118.

The comments were made about judges of courts of general jurisdiction—judges selected by the people of a populous and educated community. They concerned the attitude of the judges toward those who were charged with crime, not comments on evi-

problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted."

13. "These respondents deny any intent by either said editorial or said cartoon either in words or otherwise to interfere with fair and impartial justice in the State of Florida and deny that the large character in the cartoon was beside the judge and on the bench and being heard, recognized and favored, but, on the contrary, these respondents respectfully show that it was the intention of said editorial and said cartoon to condemn and criticise the system of pleading and practice and procedure created by the laws of Florida, whereby such cases could long be delayed and then could be dismissed upon technical grounds in the manner herein shown."

We add Mr. Pennekamp's statement of the editorial policy of the Miami Herald:

"'We are ourselves Free—Free as the Constitution we enjoy—Free to truth, good manners and good sense. We shall be for whatever measure is best adapted to defending the rights and liberties of the people and advancing useful knowledge. We shall labor at all times to inspire the people with a just and proper sense of their condition, to point out to them their true interest and rouse them to pursue it.'"

dence or rulings during a jury trial. Their effect on juries that might eventually try the alleged offenders against the criminal laws of Florida is too remote for discussion. Comment on pending cases may affect judges differently. It may influence some judges more than others. Some are of a more sensitive fiber than their colleagues. The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in the face of criticism which individual judges may possess any more than it generally can depend on the personal equations or individual idiosyncrasies of the tort-feasor. *The Germanic*, 196 U. S. 589, 596; *Arizona Employers' Liability Cases*, 250 U. S. 400, 422, 432. We are not willing to say under the circumstances of this case that these editorials are a clear and present danger to the fair administration of justice in Florida. Cf. *Near v. Minnesota*, 283 U. S. 697, 714-15.

What is meant by clear and present danger to a fair administration of justice? No definition could give an answer. Certainly this criticism of the judge's inclinations or actions in these pending non-jury proceedings could not directly affect such administration. This criticism of his actions could not affect his ability to decide the issues. Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings. For such injuries when the statements amount to defamation, a judge has such remedy [redacted] damages for libel as do other public servants.

It is suggested, however, that even though his intellectual processes cannot be affected by reflections on his purposes, a judge may be influenced by a desire to placate the accusing newspaper to retain public esteem and secure reelection presumably at the cost of unfair rulings against an accused. In this case too many fine-drawn assumptions against the independence of judicial action must be made to call such a possibility a clear and present danger to justice. For this to follow, there must be a judge of less than ordinary fortitude without friends or support or a powerful and vindictive newspaper bent upon a rule or ruin policy and a public unconcerned with or uninterested in the truth or the protection of their judicial institutions. If, as the Florida courts have held and as we have assumed, the petitioners deliberately distorted the facts to abase and destroy the efficiency of the court, those misrepresentations with the indicated motives

manifested themselves in the language employed by petitioners in their editorials. The Florida courts see in this objectionable language an open effort to use purposely the power of the press to destroy without reason the reputation of judges and the competence of courts. This is the clear and present danger they fear to justice. Although we realize that we do not have the same close relations with the people of Florida that is enjoyed by the Florida courts, we have no doubt that Floridians in general would react to these editorials in substantially the same way as citizens of other parts of our common country.

As we have pointed out, we must weigh the impact of the words against the protection given by the principles of the First Amendment, as adopted by the Fourteenth, to public comment on pending court cases. We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 473.—October Term, 1945.

John D. Pennekamp and the Miami Herald Publishing Company, Petitioners, vs. The State of Florida.	On Writ of Certiorari to the Supreme Court of the State of Florida.

[June 3, 1946.]

Mr. Justice Frankfurter concurring.

On the basis of two editorials and a cartoon, the Circuit Court of Florida for the County of Dade found the publisher of the Miami *Herald* and one of its editors guilty of contempt of court.[1] The editor, Pennekamp, was fined $250 and the Publishing Company, $1,000. Deeming *Bridges* v. *California*, 314 U. S. 252 not controlling, the Supreme Court of Florida, with two judges dissenting, sustained the convictions. 22 So. 2d 875.

In the *Bridges* case this Court recently canvassed constitutional aspects of contempt of court by publication. But it was hardly to be expected that other problems in the large field within which the *Bridges* case moved would not recur. This Court sits to interpret, in appropriate judicial controversies, a Constitution which in its Bill of Rights formulates the conditions of a democracy. But democracy is the least static form of society. Its basis is reason not authority. Formulas embodying vague and uncritical generalizations offer tempting opportunities to evade the need for continuous thought. But so long as men want freedom they resist this temptation. Such formulas are most beguiling and most mischievous when contending claims are those not of right and wrong but of two rights, each highly important to the well-

[1] The judges who tried the contempt cases were the same judges who were criticized by the editorials. The words of caution of Mr. Chief Justice Taft become relevant: "The delicacy there is in the judge's deciding whether an attack upon his own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest." *Craig* v. *Hecht*, 263 U. S. 255, 279 (concurring). But the judges who tried petitioners were sensible of the delicacy of their position, and offered to retire from the case if petitioners felt they would prefer to be tried by another judge.

being of society. Seldom is there available a pat formula that adequately analyzes such a problem, least of all solves it. Certainly no such formula furnishes a ready answer to the question now here for decision or even exposes its true elements. The precise issue is whether, and to what extent, a State can protect the administration of justice by authorizing prompt punishment, without the intervention of a jury, of publications out of court that may interfere with a court's disposition of pending litigation.

The decision in the *Bridges* case did not explicitly deny to the States the right to protect the judicial process from interference by means of a publication bearing on a pending litigation. The atmosphere and emanations of the Court's opinion, however, were calculated to sanction anything to be said or written outside the courtroom even though it may hurt, or embarrass the just outcome of a proceeding. But in a series of decisions which presented most sharply the constitutional extent of freedom of speech this Court had held that the Constitution did not allow absolute freedom of expression—a freedom unrestricted by the duty to respect other needs fulfillment of which make for the ~~safety~~ dignity and security of man. *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211.

No Justice thought more deeply about the nature of a free society or was more zealous to safeguard its conditions by the most abundant regard for civil liberty than Mr. Justice Holmes, ~~or Mr. Justice Brandeis. And yet they were clear~~ that judicial protection of freedom of utterance is necessarily qualified by the requirements of the Constitution as an entirety for the maintenance of a free society. It does an ill-service to the ~~significance of Mr. Justice Holmes~~ author of the most quoted judicial phrases regarding freedom of speech, to make him the victim of a tendency which he fought all his life, whereby phrases are made to do service for critical analysis by being turned into dogma. "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." Holmes, J., dissenting, in *Hude* v. *United States*, 225 U. S. 347, 384, at 391. Words which "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has

He left no doubt

a right to prevent," *Schenck* v. *United States*, 249 U. S. 47, 52, speak their own condemnation. But it does violence to the juristic philosophy and the judicial practice of Mr. Justice Holmes to assume that in using the phrase "a clear and present danger" he was expressing even remotely an absolutist test or had in mind a danger in the abstract. He followed the observation just quoted by the emphatic statement that the question is one "of proximity and degree," as he conceived to be most questions in connection with the large, undefined rights guaranteed by the Constitution. And Mr. Justice Brandeis, co-architect of the great constitutional structure of civil liberties, also recognized that "the permissable curtailment of free speech is . . . one of degree. And because it is a question of degree the field in which the jury may exercise its judgment is, necessarily, a wide one." *Schaefer* v. *United States*, 251 U. S. 466, 482, at 483 (dissenting). If Mr. Justice Brandeis' constitutional philosophy means anything, it is clear beyond peradventure that he would not deny to a State exercising its judgment as to the mode by which speech may be curtailed by punishment subsequent to its utterance a field less wide than that which he permitted a jury in a federal court.

"Clear and present danger" was never used by Mr. Justice Holmes to express a technical legal doctrine or to convey a formula for adjudicating cases. It was a literary phrase not to be distorted by being taken from its context. In its setting it served to indicate the importance of freedom of speech to a free society but also to emphasize that its exercise must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by our Constitution. When those other attributes of a democracy are threatened by speech the Constitution does not deny power to the States to curb it. "The clear and present danger" to be arrested may be danger short of a threat as comprehensive and vague as a threat to the safety of the Republic or "the American way of life." Neither Mr. Justice Holmes nor Mr. Justice Brandeis nor this Court ever suggested in all the cases that arose in connection with the First World War, that only imminent threats to the immediate security of the country would authorize courts to sustain legislation curtailing utterance. Such forces of destruction are of an order of magnitude which courts are hardly designed to counter. "The clear and present danger" with which

its two great judicial exponents were concerned, was a clear and present danger that utterance "would bring about the evil which Congress sought and had a right to prevent." *Schenck* v. *United States, supra.* Among "the substantive evils" with which legislation may deal is the hampering of a court in a pending controversy, because the fair administration of justice is one of the chief tests of a true democracy. And since men equally devoted to the vital importance of freedom of speech may fairly differ in an estimate of this danger in a particular case, the field in which a State "may exercise its judgment is, necessarily, a wide one." Therefore, every time a situation like the present one comes here the precise problem before us is to determine whether the State court went beyond the allowable limits of judgment in holding that conduct which has been punished as a contempt was reasonably calculated to endanger a State's duty to administer impartial justice in a pending controversy.

Without a free press there can be no free society.[2] Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and

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[2] ". . . the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privileges." *Near* v. *Minnesota*, 283 U. S. 697, 719-20.

Not unrelated to this whole problem, however, are the technological and economic influences that have vastly transformed the actual operation of the right to a free, in the sense of a governmentally uncensored, press. Bigness and concentration of interest have put their impress also on this industry. "Today ideas are still flowing freely, but the source from which they rise have shown a tendency to evaporate. . . . The controlling fact in the free flow of thought is not diversity of opinion, it is diversity of the *sources* of opinion—that is, diversity of ownership. . . . There are probably a lot more words written and spoken in America today than ever before, and on more subjects, but if it is true as this book suggests, that these words and ideas are flowing through fewer channels, then our first freedom has been diminished, not enlarged." E. B. White, in the New Yorker, March 16, 1946, p. 97, reviewing Ernst, *The First Freedom* (1946). There are today incomparably more effective and more widespread means for the dissemination of ideas and information than in the past. But a steady shrinkage of a diffused ownership raises far reaching questions regarding the meaning of the "freedom" of a free press.

in that light applied. The independence of the judiciary is no less a means to the end of a free society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective. For the judiciary cannot function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court. A judiciary is not independent unless courts of justice are enabled to administer law by absence of pressure from without, whether exerted through the blandishments of reward or the menace of disfavor. In the noble words, penned by John Adams, of the First Constitution of Massachusetts: "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice." It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit."[3] A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.

A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute power.[4] Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. See Carl L. Becker, *Freedom and Responsibility in the American Way of Life* (1945). In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise.

[3] Article XXIX of the Declaration of Rights of the Constitution of Massachusetts, 1780.

[4] That this indispensable condition for a free society was well known to the framers of the Constitution, is the theme of Mr. Justice Brandeis in his dissenting opinion, in *Myers* v. *United States*, 272 U. S. 52, 240, at 293: "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." And see Mr. Chief Justice Taft, in Ex parte *Grossman*, 267 U. S. 87, 119-22.

Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was imbedded in the law.[5] The First Amendment safeguarded the right.

These are generalities. But they are generalities of the most practical importance in achieving a proper adjustment between a free press and an independent judiciary.

Especially in the administration of the criminal law—that most awesome aspect of government—society needs independent courts of justice. This means judges free from control by the executive, free from all ties with political interests, free from all fears of reprisal or hopes of reward. The safety of society and the security of the innocent alike depend upon wise and impartial criminal justice. Misuse of its machinery may undermine the safety of the State; its misuse may deprive the individual of all that makes a free man's life dear.[6]

Criticism therefore must not feel cramped, even criticism of the administration of criminal justice. Weak characters ought not to be judges, and the scope allowed to the press for society's sake may assume that they are not. No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his de-

on June 17, 1946, awarding Campbell $15,000, including damages for loss of earnings, for wrongful conviction, after his pardon, on the score of innocence, by Governor Dewey, following the confession by another of the crimes for which Campbell had been convicted. "He was the victim of a miscarriage of justice but fortunately for him the state has undertaken to rectify the mistake as far as possible. . . . Seven years, six months and five days elapsed from claimant's arrest until he was pardoned."

~~conviction of Bertram M. Campora (Dec. 22, 1940), and the decision of the New York Court of Claims, awarding compensation to Campbell for wrongful conviction after his pardon, on the ground of innocence, by Governor Dewey. N. Y. Herald-Tribune, May 8, 1946, p. 1, col. 8.~~

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The English bench is justly noted for its sturdiness, and it was no weak-kneed judge who recently analyzed the mischief of exposing even the hardiest nature to extraneous influence: "'. . . I think it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being, and while I do not suggest that it is likely that any judge, as the result of information which had been improperly conveyed to him would give a decision which otherwise he would not have given, it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it much more difficult for him to do his duty. To repeat the words I have already read from the judgment of Wills, J., in *Rex* v. *Parke* [(1903) 2 K. B. 432]: 'The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it.' . . . I venture to think that no judge with long criminal experience will fail to be able to recall instances in which the publication of matters such as that to which I have referred has had the effect of making the task of a judge extremely difficult, and no one has the right to publish matter which will have that effect." Humphreys, J., in *Rex* v. *Parks*, [1945] 1 K. B. 435, 442-43. The observations of another judge in the same case bear quoting: ". . . jurors are not the only people whose minds can be affected by prejudice. One of the evils of inadmissable matter being disseminated is that no one can tell what effect a particular piece of information may have on his mind. Why, as my Lord has asked, and I can think of no better word, should a judge be 'embarrassed' by having matters put into his mind, the effect of which it is impossible to estimate or assess? As an illustration of this proposition, the Court of Criminal Appeal has expressed not once but many times, its thorough disapproval of evidence which is sometimes given by police officers at the end of a case when a man has been convicted. On such occasions all sorts of allegations are frequently made against a man's character, sometimes in the nature of hearsay and sometimes not supported by evidence at all. What is the ground for the disapproval of the Court of Criminal Appeal regarding such statements? It can only be that the judge, who, after hearing

the statements, has to pronounce sentence, may quite unconsciously, have his judgment influenced by matters which he has no right to consider. . . . Not all defamatory matter can amount to contempt of court . . . whether defamatory matter amounts to contempt in any particular case is a question in each case of fact, of degree and of circumstances." Oliver, J., in *Rex* v. *Davies*, *supra*, at 445-46. *Cf. Parashuram Detaram Shamdasani* v. *King-Emperor*, [1945] A. C. 264. To deny that bludgeoning or poisonous comment has power to influence, or at least to disturb, the task of judging is to play make-believe and to assume that men in gowns are angels. The psychological aspects of this problem become particularly pertinent in the case of elected judges with short tenure.

"Trial by newspaper," like all catch phrases, may be loosely used but it summarizes an evil influence upon the administration of criminal justice in this country. Its absence in England, at least its narrow confinement there, furnishes an illuminating commentary. It will hardly be claimed that the press is less free in England than in the United States. Nor will any informed person deny that the administration of criminal justice is more effective there than here. This is so despite the commonly accepted view that English standards of criminal justice are more civilized, or, at the least, that recognized standards of fair conduct in the prosecution of crime are better observed. Thus, "the third degree" is not unjustly called "the American method." This is not the occasion to enlarge upon the reasons for the greater effectiveness of English criminal justice but it may be confidently asserted that it is more effective partly because its standards are so civilized.[8] There are those who will resent such

[7] Compare *Inquiry in Regard to the Interrogation by the Police of Miss Savidge*, Cmd. 3147 (1928); *Report of the Royal Commission on Police Powers and Procedure*, Cmd. 3297 (1929), with *Report on Lawlessness in Law Enforcement*, in 4 National Commission on Law Observance and Enforcement Reports (1931). See also *Wan* v. *United States*, 266 U. S. 1; *Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227.

[8] The recent ruling by the Speaker of the House of Commons regarding the limitation on the right to comment even in Parliament on the pending proceedings against the accused Nazis before the Nuremberg tribunal bears significantly on the attitude and controlling standards deemed appropriate in England in order to protect the judicial process from extraneous influences.

"The Rule to which the Noble Lord has drawn my attention that reflections cannot be made on judges of the High Court and certain other courts, except by way of a substantive Motion, applies only to the courts of this country. In terms, therefore, it only covers the two British members of this tribunal. I feel that it would be worse than invidious—indeed improper—not to extend

a statement as praise of another country and dispraise of one's own. What it really means is that one covets for his own country a quality of public conduct not surpassed elsewhere.

Certain features of American criminal justice have long been diagnosed by those best qualified to judge as serious and remediable defects. On the other hand, some mischievous accompaniments of our system have been so pervasive that they are too often regarded as part of the exuberant American spirit. Thus, "trial by newspapers" has sometimes been explained as a concession to our peculiar interest in criminal trials. Such interest might be an innocent enough pastime were it not for the fact that the stimulation of such curiosity by the press and the response to such stimulated interest have not failed to cause grievous tragedies committed under the forms of law. Of course trials must be public and the public have a deep interest in trials. The public's legitimate interest, however, precludes distortion of what goes on inside the courtroom, dissemination of matters that do not come before the court, or other trafficking with truth intended to influence proceedings or inevitably calculated to disturb the course of justice. The atmosphere in a courtroom may be subtly influenced from without.[9] See dissenting opinion of Mr. Justice Holmes, in *Frank* v. *Mangum*, 237 U. S. 309, 347, at

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the same protection to their colleagues on this tribunal who represent the three other Allied Nations.

"There is, however, another of our Rules of Debate which is relevant to this case, the Rule that matters which are *sub judice* should not be the subject of discussion in this House. This Rule again, in terms, applies only to British courts. The court in Nuremberg is a court in which British judges participate, and we have the same interest in seeing that nothing is done here to disturb its judicial atmosphere as we have in the case of British courts—indeed, perhaps a greater interest, since the eyes of the world are upon this new and difficult procedure of international justice, and the consequences of ill-advised interference might be incalculably mischievous.

"I think that the intention of both the Rules to which I have referred, is to preserve the House from even the appearance of interfering in the administration of British justice—and this should include trials for which this country has some responsibility; and I rule, therefore, that all the Members of this International Court are protected to the same extent as British judges, and that discussion of its proceedings is out of Order, in the same way as matter under adjudication in a British court of law." 416 Parliamentary Debates (Hansard) 599-600, Nov. 22, 1945.

[9] The manner in which the Hauptmann trial was reported led to a searching inquiry by a special committee of the American Bar Association and it reported the following recommendations:

"In the foregoing report we have tried to make a fair presentation of salient facts. We have been moved less by spirit of censure than by hope of remedial action. The excesses we have described differ from practices in many other cases mainly in degree.

"The trial of a criminal case is a business that has for its sole purpose

349. Cases are too often tried in newspapers before they are tried in court, and the cast of characters in the newspaper trial too often differs greatly from the real persons who appear at the trial in court and who may have to suffer its distorted consequences.[10]

Newspapers and newspaper men themselves have acknowledged these practices, deplored their evils, and urged reform.[11] **See**

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the administration of justice, and it should be carried on without distracting influences.

"Passing from the general to the specific we recommend:

"That attendance in the courtroom during the progress of a criminal trial be limited to the seating capacity of the room.

"That the process of subpoena or any other process of the court should never be used to secure preferential admission of any person or spectator that such abuse of process be punished as contempt.

"That approaches to the courtroom be kept clear, to the end that free access to the courtroom be maintained.

"That no use of cameras or photographic appliances be permitted in the courtroom, either during the session of the court or otherwise.

"That no sound registering devices for publicity use be permitted to operate in the courtroom at any time.

"That the surreptitious procurement of pictures or sound records be considered contempt of court and be punished as such.

"That the courtroom and the court house be kept free from news distributing devices and equipment.

"That newspaper accounts of criminal proceedings be limited to accounts of occurrences in court without argument of the case to the public.

"That no popular referendum be taken during the pendency of the litigation as to the guilt or innocence of the accused.

"That broadcasting of arguments, giving out of argumentive press bulletins, and every other form of argument or discussion addressed to the public by lawyers in the case during the progress of the litigation be definitely forbidden.

"That bulletins by the defendant issued to the public during the progress of the trial be definitely forbidden.

"That public criticism of the court or jury by lawyers in the case during the progress of the litigation be not tolerated.

"That featuring in vaudeville of jurors or other court officers, either during or after the trial, be forbidden.

"That the giving of paid interviews or the writing of paid articles by jurors, either during or after the trial, be forbidden.

"That the atmosphere of the courtroom and adjacent premises be maintained as one of dignity and calm." (1936) 22 *A. B. A. Journal* 799.

[10] *See, e. g., Gilman, The Truth Behind the News* (Jun., 1935) 29 American Mercury 139. "It is idle for such newspapers to claim they adhere to such practices in the public interest. Their motive is the sordid one of increasing profits, unmindful of the result to the unfortunate wretch who may thereby have to stand his trial for murder." Mr. Justice Blair, in *Irvin* v. *Texas* (1934) N. Z. L. R. 131, 148, at 150. *Cf.* Pratt, *How Shall We Regard the News* (Feb., 1916) 132 Harper's Magazine, 97, 105.

[11] A professional defense of crime reporting has this bit of refreshing candor: "I will concede, however, that had it not been for popular interest developed to fever heat by the newspapers, Hickman might be living today behind the walls of some madhouse instead of having met death in the electric chair." Dewey, *Crime and the Press* (Dec. 30, 1927) 15 Commonwealth 233. Compare the statement by one of the most experienced criminal lawyers, Clarence Darrow:

The Attorney General's Conference on Crime (1934) 82-111. One of the most zealous claimants of the prerogatives of the press, the Chicago *Tribune*, has even proposed legal means for the correction of these inroads upon the province of criminal justice: "The Tribune advocates and will accept drastic restriction of this preliminary publicity. The penetration of the police system and the courts by journalists must stop. With such a law there would be no motivation for it. Though such a law will be revolutionary in American journalism, though it is not financially advisable for newspapers, it is still necessary. Restrictions must come."[12]

It is not for me to express approval of these views, still less, judgment on the constitutional issues that would arise if they were translated into legislation. But they are relevant to an understanding of the nature of our problem. They serve also to emphasize that the purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. ". . . the liberty of the press is no greater and no less than the liberty of every subject of the Queen." *Regina* v. *Gray*, [1900] 2 Q. B. 36, 40, and, in the United States, it is no greater than the liberty of every citizen of the Republic. The right to undermine proceedings in court is not a special prerogative of the press.

"Trial by jury is rapidly being destroyed in America by the manner in which the newspapers handle all sensational cases. I don't know what should be done about it. The truth is that the courts and the lawyers don't like to proceed against newspapers. They are too powerful. As the law stands today there is no important criminal case where the newspapers are not guilty of contempt of court day after day. All lawyers know it, all judges know it and all newspapers know it. But nothing is done about it. No new laws are necessary. The court has full jurisdiction to see that no one influences a verdict or a decision. But everyone is afraid to act." Quoted by Perry, *Trial by Newspapers* (1931) 30 Mich L. Rev. 228, 234; (1932) 66 U. S. Law Rev. 374, 379; (1932) 11 Phil. L. J. 277, 282.

[12] 30 Mich. L. Rev. at 232; 66 U. S. Law Rev. at 377; 11 Phil. L. J. at 280. In an address before the 1936 meeting of the American Bar Association Delegates, Sir Wilmott Lewis, the veteran Washington correspondent of *The Times* (London) expressed these views:

"The point I would make is that neither the tradition of orderly legal procedure, nor the obligation which the press should recognize to the maintenance of that tradition, can, *in themselves*, be enough amid the pressure and vulgarity of the modern world.

"Tradition and obligation must *be buttressed by rules*, and *those rules must be enforced* in the domain of their immediate application by the court itself.

"I think it intolerable, and I cannot think that it should not be punishable, that a charge lying against any citizen should be irresponsibly tried in the public prints, whose plain duty is the reporting, and not the hearing of causes. . . ." (1936) 20 J. Am. Jud. Soc. 84, 86.

The press does have the right, which is its professional function, to criticize and to advocate. The whole gamut of public affairs is the domain for fearless and critical comment, and not least the administration of justice. But the public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice.[13] It should not and may not attempt to influence judges or juries before they have made up their minds on pending controversies. Such a restriction, which merely bars the operation of influence specifically directed to a concrete case, in no wise curtails the fullest discussion of public issues generally. It is not suggested that generalized discussion of a particular topic should be forbidden, or run the hazard of contempt proceedings, merely because some phases of such a general topic may be involved in a pending litigation. It is the focused attempt to influence a particular decision that may have a corroding effect on the process of justice, and it is such comment that justifies the corrective process.

The administration of law, particularly that of the criminal law, normally operates in an environment that is not universal or even general but individual. The distinctive circumstances of a particular case determine whether law is fairly administered in that case, through a disinterested judgment on the basis of what has been formally presented inside the courtroom on explicit considerations, instead of being subjected to extraneous factors

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[13] See the skeptical remarks of H. L. Mencken, a stout libertarian, on the efficacy of journalistic self-restraint:

> "Journalistic codes of ethics are all moonshine. Essentially, they are absurd as would be codes of street-car conductors, barbers or public jobholders. If American journalism is to be purged of its present swinishness and brought up to a decent level of repute—and God knows that such an improvement is needed—it must be accomplished by the devices of morals, not by those of honor. That is to say, it must be accomplished by external forces, and through the medium of penalties exteriorly inflicted." Quoted by LeViness, in *Law and the Press*, *The Daily Record, Baltimore*, March 11, 1932, p. 3, col. 1, 4.

The author of the article, Mr. LeViness, a Baltimore *Sun* reporter turned lawyer, followed the quotation from Mr. Mencken with this comment:

> "This puts the problem, as far as Court and public news goes, squarely back where it belongs: in the lap of the judiciary. The Courts must set the standards; the better journals will follow joyously and the gum chewers' sheets must be whipped into line. The solution is fearless jurists, not afraid of the double-edged sword of contempt process; intelligent jurists, able to exercise this power in the best, enlightened public interest." *Ibid.*

psychologically calculated to disturb the exercise of an impartial and equitable judgment.

If men, including judges and journalists, were angels, there would be no problems of contempt of court. Angelic judges would be undisturbed by extraneous influences and angelic journalists would not seek to influence them. The power to punish for contempt, as a means of safeguarding judges in deciding on behalf of the community as impartially as is given to the lot of men to decide, is not a privilege accorded to judges. The power to punish for contempt of court is a safeguard not for judges as persons but for the function which they exercise. It is a condition of that function—indispensable for a free society—that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertow of extraneous influence. In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries. That is no more freedom of speech than stuffing a ballot box is an exercise of the right to vote.

Due regard for these general considerations must dispose of the present controversy. Since at the core of our problem is a proper balance between two basic conditions of our constitutional democracy—freedom of utterance and impartial justice—we cannot escape the exercise of judgment on the particular circumstances of the particular case. And we must always bear in mind that since a judgment from a State court comes here as the voice of the State, it must be accorded every fair intendment that in reason belongs to action by a State.

According to the Florida Supreme Court, the charge against petitioners was that "both the editorials and the cartoon were predicated on inaccurate, distorted, incomplete and biased reports of pending litigation, that the purpose and effect of the editorials and the cartoon were to impute partisanship and favor on the part of the circuit judges to those charged with crime and that such partisanship was so pronounced that they refused to heed the voice of the people's representatives. . . . So the vice in both the editorials was the distorted, inaccurate statement of the facts and with that statement were scrambled false insinuations that amounted to unwarranted charges of partisanship and unfairness on the part of the judges."[14] The tenor of the first editorial was

[14] *Pennekamp* v. *State*, 22 So. 2d 875, 881, 882.

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complaint of the technicalities and delays of the law which seem to give excessive protection to defendants. It makes no suggestion which could be construed as an attempt to influence the court's decision in a matter actually pending before it. All the questions discussed in the editorial had been acted on by the trial judges. The editor merely indulged in general criticism of those acts as exemplifying an over-solicitous concern for defendants by the law and by the judges who interpreted it. Nor was the cartoon directed toward a particular pending case. Indeed, it partly serves to interpret the editorial as one concerned with a general situation. One suspects that only judicial hypersensitiveness would find in it an animus specifically directed. The opinion of the court illustrates the danger of confusing correction of interference with judicial action with concern over a court's dignity. Instead of treating lightly a cartoon indistinguishable in type from scores of such ephemeral products, the court saw in it wholly undeserved significance.

Again, the second editorial referred to a particular case only as an example. In that case, too, the court had made its decision. What the editor criticized was the speed of disposition and other features of procedure which attended the case. His allowable concern was that the people have a chance to give their argument, that the prosecution in criminal cases be treated as fairly as the defense. Inaccurate and even false comment on litigation no longer pending may not be dealt with by punishing for contempt as a means of assuring the just exercise of the judicial process.

The Florida Supreme Court referred to the cases criticized as "pending." But it did not define the scope of "pending," nor did the grounds of its decision have any particular dependence on the requirement that a case be pending. The finding by a State court that a case is "pending" in the sense relevant to the power to punish for contempt does not, of course, foreclose its review here. Otherwise a State court could foreclose our protection of the constitutional right of free speech by putting forth as a non-federal ground of decision that which is an essential aspect of the federal question. *Union Pac. R. R. Co.* v. *Pub. Service Comm.*, 248 U. S. 67, 69-70; *Ward* v. *Love County*, 253 U. S. 17, 22; *Davis* v. *Wechsler*, 263 U. S. 22.

If it is contemptuous to bring the courts of a State into disrepute and generally to impair their efficiency, then it can make

no difference on what occasion or with reference to what event, that effect is achieved or attempted. But when it is understood what is meant by a "pending" case, it becomes plain that for purposes of punishing for contempt as interference, the cases were not actively pending. "Pending" is not used with the technical inclusiveness that it has in the phrase *lis pendens*. In the situations in which that phrase has meaning and applicability, the important considerations are whether any proceedings have been taken to put the issue into court and whether it is still there. Where the power to punish for contempt is asserted, it is not important that the case is technically in court or that further proceedings, such as the possibility of a rehearing, are available. "When a case is pending is not a technical, lawyer's problem, but is to be determined by the substantial realties of the specific situation." *Bridges* v. *California*, 314 U. S. 252, 279, at 303-304 (dissent). The decisive consideration is whether the judge or the jury is, or presently will be, pondering a decision that comment seeks to affect. Forbidden comment is such as will or may throw psychological weight into scales which the court is immediately balancing. *Cf.* L. Hand, J., in *Ex parte Craig*, 282 Fed. 138, 159-60. In the situation before us, the scales had come to rest. The petitioners offended the trial court by criticizing what the court had already put in the scales, not by attempting themselves to insert weights.

The petitioners here could not have disturbed the trial court in its sense of fairness but only in its sense of perspective. The judgment must, I agree, be reversed.

Mr. Justice MURPHY, concurring.

Were we to sanction the judgment rendered by the court below we would be approving, in effect, an unwarranted restriction upon the freedom of the press. That freedom covers something more than the right to approve and condone insofar as the judiciary and the judicial process are concerned. It also includes the right to criticize and disparage, even though the terms be vitriolic, scurrilous or erroneous. To talk of a clear and present danger arising out of such criticism is idle unless the criticism makes it impossible in a very real sense for a court to carry on the administration of justice. That situation is not even remotely present in this case.

Judges should be foremost in their vigilance to protect the freedom of others to rebuke and castigate the bench and in their refusal to be influenced by unfair or misinformed censure. Otherwise freedom may rest upon the precarious base of judicial sensitiveness and caprice. And a chain reaction may be set up, resulting in countless restrictions and limitations upon liberty.

Mr. Justice RUTLEDGE, concurring.

One can have no respect for a newspaper which is careless with facts and with insinuations founded in its carelessness. Such a disregard for the truth not only flouts standards of journalistic activity[1] observed too often by breach, but in fact tends to bring the courts and those who administer them into undeserved public obloquy.

But if every newspaper which prints critical comment about courts without justifiable basis in fact, or withholds the full truth, in reporting their proceedings or decisions, or goes even further and misstates what they have done, were subject on these accounts to punishment for contempt, there would be few not frequently involved in such proceedings. There is perhaps no area of news more inaccurately reported factually, on the whole, though with some notable exceptions, than legal news.

Some part of this is due to carelessness, often induced by the haste with which news is gathered and published, a smaller portion to bias or more blameworthy causes. But a great deal of it

[1] See the following codes of ethics published in Crawford, The Ethics of Journalism (1924) App. A.: Canons of Journalism, Adopted by the American Society of Newspaper Editors in 1923, Art. IV; The Oregon Code of Ethics, Adopted by the Oregon State Editorial Association in 1922, Art. I; South Dakota Code of Ethics, adopted by the South Dakota Press Association, in 1922, "Truth and Honesty"; Missouri Declaration of Principles and Code of Practice, adopted by the Missouri Press Association in 1921, "Editorial." And see in the same volume the extracts from rules and suggestions prepared by the following newspapers for the guidance of their staffs: The Brooklyn Eagle, The Christian Science Monitor, The Springfield Union; The Detroit News, The Hearst Newspapers (personal instructions given by William Randolph Hearst to his newspapers), The Sacramento Bee, The Kansas City Journal-Post, the Marion Star (written by President Harding when editing The Star). See also Sharkey, The Ethics of Journalism: An Address Delivered before the Press Conference of the World, Geneva, Switzerland, September 15, 1926, p. 10; Wicks, Ideals and Methods of English Newspapers, published in Journalistic Ethics and World Affairs, Addresses Delivered at the Fifteenth Annual Journalism Week at the University of Missouri, 1924, 25 U. of Mo. Bull. (No. 32) 25, 26; Gibbons, Newspaper Ethics (1926) 16 *et seq.*

must be attributed, in candor, to ignorance which frequently is not at all blameworthy. For newspapers are conducted by men who are laymen to the law. With too rare exceptions their capacity for misunderstanding the significance of legal events and procedures, not to speak of opinions, is great. But this is neither remarkable nor peculiar to newsmen. For the law, as lawyers best know, is full of perplexities.

In view of these facts any standard which would require strict accuracy in reporting legal events factually or in commenting upon them in the press would be an impossible one. Unless the courts and judges are to be put above criticism, no such rule can obtain. There must be some room for misstatement of fact, as well as for misjudgment, if the press and others are to function as critical agencies in our democracy concerning courts as for all other instruments of government.

Courts and judges therefore cannot be put altogether beyond the reach of misrepresentation and misstatement. That is true in any case, but perhaps more obviously where the judiciary is elective, as it is in most of our states, including Florida. See *Storey* v. *Illinois*, 79 Ill. 45, 52; (1927) 41 Harv. L. Rev. 254, 255. The question, and the standard, must be one of degree and effects. It cannot be placed at mere falsity, either in representation or in judgment. The statement, whether of fact or of opinion, must be of such a character, whether true or false, as to obstruct in some clear and substantial way the functioning of the judicial process in pending matters. *Bridges* v. *California*, 314 U. S. 252.[2] It is not enough that the judge's sensibilities are affected or that in some way he is brought generally into obloquy. After all, it is to be remembered that it is judges who apply the law of contempt, and the offender is their critic.

The statements in question are clearly fair comment in large part. Portions exceed that boundary. But the record does not disclose that they tended in any way to block or obstruct the functioning of the judicial process. Accordingly I concur in the Court's opinion and judgment.

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[2] "Nor does the fact that the letter was false, while it greatly affects the moral quality of the act, determine its criminality. It is punishable only if it interferes with justice, and in that respect truth is harder to meet than falsehood." L. Hand, dissenting in Ex parte Craig, 282 Fed. 138, 161, aff'd *sub nom.* Craig v. Hecht, 263 U. S. 255. See also the dissenting opinion of Mr. Justice Holmes, 263 U. S. at 281. But cf. In re Providence Journal Co., 28 R. I. 489; In re San Francisco Chronicle, 1 Cal. 2d 630.